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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

FRED LOWENSCHUSS,
Petitioner

v.

RESORTS INTERNATIONAL, INC.,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

This case presents questions of national importance concerning the power of bankruptcy courts to confirm plans of reorganization under the Bankruptcy Code and to administer their dockets, on which there is conflict among the courts of appeal of the various circuits:

1. Does section 524(e) of the Bankruptcy Code strictly preclude bankruptcy courts from discharging liabilities of non-debtors, *without exception,* or does section 105(a) of the Code give bankruptcy courts the equitable power to do so, under exceptional circumstances, when necessary to achieve successful reorganizations under Chapter 11?

2. Is it an abuse of discretion for a bankruptcy court to exercise control of its docket by requiring a creditor in an adversary proceeding either to try its claim on the merits or to withdraw the claim unconditionally with prejudice?

3. Where a creditor fails to seek a stay of a bankruptcy court's confirmation of a plan of reorganization and the plan becomes fully implemented and substantially consummated, should the creditor's appeal of the confirmation be deemed moot?

PARTIES TO THE PROCEEDING

The parties to this proceeding are petitioner Fred Lowenschuss, an individual who is the debtor in the underlying Chapter 11 reorganization proceedings, and respondent Resorts International, Inc., a creditor in those proceedings.

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RESORTS INTERNATIONAL, INC.,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPINIONS IN THE COURTS BELOW

The opinion of the Court of Appeals is reported at 67 F.3d 1394 and appears in the attached appendix at 1a—23a. The memorandum of the District Court is unreported and appears in the appendix at 39a—43a. The order of confirmation is unreported and appears in the appendix at 33a—38a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 10, 1995. The Court of Appeals denied petitioner's Petition for Rehearing and Suggestion for Rehearing en Banc on November 24, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED IN THE CASE

This case involves, *inter alia,* the interpretation of and relationship between two sections of the Bankruptcy Code of 1978, 11 U.S.C. §§ 105(a) and 524(e), as amended.

Section 524(e) provides as follows:

> Except as provided in subsection (a)(3) of this subsection [relating to spousal debts], discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

Section 105(a) provides in pertinent part:

> The court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title . . . .

The case also involves the application of Federal Rule of Bankruptcy Procedure 3006, which provides in pertinent part:

> . . . If after a creditor has filed a proof of claim an objection is filed thereto or a complaint is filed against that creditor in an adversary proceeding, or the creditor has accepted or rejected the plan or otherwise has participated significantly in the case, the creditor may not withdraw the claim except on order of the court after a hearing . . . . The order of the court shall contain such terms and conditions as the court deems proper. Unless the court orders otherwise, an authorized withdrawal of a claim shall constitute withdrawal of any related acceptance or rejection of a plan.

STATEMENT OF THE CASE

Federal Jurisdiction in the Court of First Instance

This case arises out of a voluntary Chapter 11 reorganization filed by petitioner Fred Lowenschuss in the United States Bankruptcy Court for the District of Nevada, which had jurisdiction pursuant to 28 U.S.C. § 157. The Bankruptcy Court's confirmation of debtor's plan of reorganization was appealed by respondent Resorts International, Inc., to the United States District Court for the District of Nevada, which had appellate jurisdiction under 28 U.S.C. § 158(a).

Factual Background

In 1970, petitioner Fred Lowenschuss established Fred Lowenschuss Associates, a professional corporation, with a pension and profit-sharing plan ("the Pension Plan") for the professional corporation's employees. The Pension Plan eventually held approximately $8 million in assets, including substantial holdings in stocks and bonds of respondent Resorts International, Inc. (hereinafter "Resorts").

In July 1989, Lowenschuss, as Trustee of the Pension Plan, surrendered 105,700 of its shares in Resorts in exchange for $36 per share, for a total of $3,805,200.00. This surrender was pursuant to the terms and instructions set forth in Resorts' written tender offer, contained in a Notice of Merger dated November 15, 1988, which was sent to the Pension Plan and other shareholders.[1]

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1. Resorts' notice provided, in relevant part:

> "To receive payment of the $36.00 per share in cash to be paid pursuant to the Merger, record holders must complete the enclosed Letter of Transmittal (or a facsimile thereof) and must present the Letter of Transmittal and stock certificates which prior to the Merger represented Shares, to the Paying Agent on or prior to November 15, 1989. . . .
>
> "Any record holder who has properly demanded appraisal of his shares pursuant to Section 262 of the General Corporation Law of the States of Delaware may withdraw such demand and receive $36.00 per share in cash without interest thereon, by

On September 26, 1989, respondent Resorts sued petitioner Fred Lowenschuss in the United States District Court for the Eastern District of Pennsylvania (where Lowenschuss then resided), in an attempt to rescind the transaction and recoup the $3,805,200. Resorts' claim was primarily on the grounds that the terms of its own contract were illegal under Delaware state law.[2]

On November 12, 1989, Resorts filed for Chapter 11 relief in the Bankruptcy Court for the District of New Jersey. Resorts' action against Lowenschuss was thereafter removed to that court as an adversary proceeding. On June 16, 1992, Resorts obtained an injunction under section 105 of the Bankruptcy Code to prevent the trustee of the Pension Plan from disposing of any part of the funds in dispute.

Proceedings in the Nevada Bankruptcy Court

On August 24, 1992, petitioner Lowenschuss (now a Nevada resident) commenced a voluntary Chapter 11 reorganization proceeding in the United States Bankruptcy Court for the District of Nevada.[3] Consequently, Resorts' action against Lowenschuss in the New Jersey Bankruptcy Court was stayed, pur-

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properly completing the Letter of Transmittal (or a facsimile thereof) and presenting it, together with the stock certificates formerly representing such Shares to the Paying Agent as indicated above. Delivery of the Letter of Transmittal and such certificates shall be deemed to constitute a withdrawal of such demand."

2. In its tender offer, Resorts stated that shareholders, such as the Pension Plan, who had previously demanded appraisal of their shares could withdraw their demands and receive $36.00 per share simply by completing the Letter of Transmittal and presenting it, together with the stock certificates, to the Paying Agent. (See Footnote 1, above.) In its Complaint, however, Resorts alleged that Delaware General Corporate Law § 262 required that holders of shares who preserve their appraisal rights cannot be paid anything without approval of the Delaware Chancery Court, where an appraisal proceeding, previously filed by Resorts, was still pending.

3. Lowenschuss' largest creditor was his ex-wife, Beverly Selnick, who held a $5.3 million judgment pursuant to an equitable distribution order in Pennsylvania. Selnick was represented in that action by Schnader, Harrison, Segal & Lewis — *the same Philadelphia law firm that contemporaneously brought suit on behalf of Resorts against Lowenschuss in the Eastern District of Pennsylvania.*

suant to 11 U.S.C. §362(a). On May 25, 1993, Resorts filed two proofs of claim in the Nevada Bankruptcy Court, one in an unliquidated amount and one in the amount of $3,805,200.00 plus interest. Lowenschuss filed objections to both claims.

On July 21, 1993, the Nevada Bankruptcy Court excluded the Pension Plan from Lowenschuss's bankruptcy estate because it was an ERISA qualified plan, following this Court's ruling in *Patterson v. Shumate*, 504 U.S. 753 (1992).[4] Nevertheless, the debtor's plan of reorganization provided that the Pension Plan would be the principal source of funding for the reorganization, with a contribution of approximately $3.1 million dollars.

On September 17, 1993, Resorts objected to the debtor's proposed reorganization plan, primarily because the plan would give global releases to non-debtors, including the Pension Plan, contrary to existing precedent in the Ninth Circuit.

On October 12, 1993, two days before the scheduled trial of Resorts' claims against Lowenschuss, Resorts moved for leave to withdraw its claims against Lowenschuss with prejudice, upon condition that Resorts be permitted to remain a party to the bankruptcy and to reassert its claims if the Pension Plan were later determined to be part of the debtor's estate. The Bankruptcy Court rejected these conditions. On October 14, 1993, Resorts moved to withdraw its claims unconditionally with prejudice, rather than trying its claims on the merits. This motion was granted.

With Resorts no longer a party, the Nevada Bankruptcy Court confirmed Lowenschuss' reorganization plan on October 28, 1993. The confirmed plan included a global release of the Pension Plan, which was to provide most of the funding for the reorganization, both directly and indirectly.[5]

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4. On August 19, 1994, in Appeal No. CV-N-93-565-ECR, the United States District Court remanded the issue of whether the Pension Plan was excluded from the bankruptcy estate to the bankruptcy court to conduct further evidentiary hearings. Currently, the issue of whether the Pension Plan is property of the Lowenschuss bankruptcy estate is still unresolved.

5. The Nevada District Court's opinion is clearly erroneous in stating that "[t]here is no evidence in the record that the Pension Plan is funding the Chapter 11 Plan . . . ." Appendix at 41a. In actual fact, the confirmed plan of reorganization, which is a part of the record, provides that Lowenschuss' ex-wife, Beverly Selnick (the Class 4 creditor), shall receive 38.7% of the Pension Plan (approximately $3.1 million) "*directly from the pension plan*". Appendix at 29a (emphasis added). Therefore, the evidence of record clearly

Resorts appealed the confirmation of the plan of reorganization to the District Court for the District of Nevada. However, it did not seek to stay implementation of the plan. Consequently, the confirmed plan of reorganization has already been fully implemented and substantially consummated.[6]

On August 25, 1994, Resorts filed a motion in the New Jersey Bankruptcy Court, requesting that the Pension Plan's trustee be held in contempt of the previous section 105 injunction for having made payments under the plan of reorganization. Resorts also requested that the payments be returned to the Pension Plan and that the trustee be removed. To prevent this interference with the funding of the reorganization plan, the Nevada Bankruptcy Court issued a Final Injunction against Resorts on September 6, 1994. Appendix at 44a—45a.

Decisions on Appeal

On appeal, the District Court vacated the global release provisions in the plan of reorganization, on the grounds that the Bankruptcy Court had no authority (according to Ninth Circuit precedent) to discharge the liabilities of non-debtors such as the Pension Plan. The District Court also held that the Bankruptcy Court abused its discretion in not permitting Resorts to withdraw its proofs of claim conditionally.

On November 10, 1994, the District Court stayed its order pending debtor's appeal to the Ninth Circuit. Appendix at 46a—48a. The District Court found that Resorts' actions against the Pension Plan would cause irreparable harm to the debtor, "since the result would be to convert or dismiss the debtor's Chapter 11 case." Appendix at 47a.

The Court of Appeals for the Ninth Circuit affirmed the District Court's vacating of the global release provision in the Plan of Reorganization, holding that section 524(e) of the Bankruptcy Code precludes bankruptcy courts, *without excep-*

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establishes that the Pension Plan itself is making direct payments to fund the reorganization. In addition, the Pension Plan is also the ultimate funding source for the unsecured creditors, who are to receive 18% of their claims over 60 months, to be paid from Lowenschuss' income from the Pension Plan.

6. To date, all creditors have been paid the entire amounts specified by the plan of reorganization, except Selnick, who has thus far been paid more than $700,000.00 and continues to receive periodic payments under the plan.

tion, from discharging the liabilities of non-debtors. A majority of the panel also affirmed the District Court's decision that Resorts should have been allowed to withdraw conditionally, to which Judge Fernandez dissented.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION, PROHIBITING BANKRUPTCY COURTS FROM CONFIRMING PLANS OF REORGANIZATION THAT CONTAIN NON-DEBTOR RELEASES, CONFLICTS WITH THE DECISIONS OF FOUR OTHER CIRCUITS AND PRESENTS AN IMPORTANT QUESTION UNDER THE BANKRUPTCY CODE.

Bankruptcy courts have increasingly granted non-debtor releases as a necessary tool in fashioning workable plans of reorganization.[7] Section 105(a) of the Bankruptcy Code vests

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7. *See, e.g., Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973 (1st Cir. 1995); *In the Matter of Specialty Equipment Companies, Inc.* 3 F.3d 1043 (7th Cir. 1993); *Menard-Sanford v. Mabey (In re A.H. Robins, Inc.)*, 880 F.2d 694 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989); *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville)*, 837 F.2d 89 (2d Cir. 1988), *cert. denied*, 488 U.S. 868 (1988); *In re AOV Industries*, 792 F.2d 1140 (D.C. Circ. 1986); *In re Apex Oil Co.*, 118 Bankr. 683 (Bankr. E.D. Mo. 1990); *Unarco Bloomington Factory Workers v. UNR Indus.*, 124 Bankr. 268 (N.D. Ill. 1990); *In re Orlando Investors, L.P.*, 103 Bankr. 593 (Bankr. E.D. Pa. 1989); *In re Fowler Floor and Wallcovering Co., Inc.*, 93 Bankr. 55 (Bankr. M.D. Pa. 1988); *In re Monroe Well Service, Inc.*, 80 Bankr. 324 (Bankr. E.D. Pa. 1987); *In re Comark*, 53 Bankr. 945 (Bankr. C.D. Cal. 1985); *Rustic Mfg., Inc. v. Marine Bank Dane County (In re Rustic Mfg., Inc.)*, 55 Bankr. 25 (Bankr. W.D. Wis. 1985); *Kasual Kreation, Inc. v. Heller Fin., Inc. (In re Kasual Kreation, Inc.)*, 54 Bankr. 915 (Bankr. S.D. Fla. 1985); *MacDonald Assocs. v. Stillwagon*, 54 Bankr. 865 (Bankr. D.R.I. 1985); *Provincetown-Boston Air Line, Inc. v. Miller (In re Provincetown-Boston Air Line, Inc.)*, 52 Bankr. 620 (Bankr. M.D. Fla. 1985); *Northlake Bldg. Partners v. Northwestern Nat'l Life Ins. Co. (In re Northlake Bldg. Partners)*, 41 Bankr. 231 (Bankr. N.D. Ill. 1984); *T. Lesser v. A-Z Assocs. (In re Lion Capital Group)*, 44 Bankr. 690 (Bankr. S.D.N.Y. 1984); *In re Lahman Manufacturing Co.*, 33 Bankr. 681 (Bankr. D.S.D. 1983); *In the Matter of Old Orchard Investment Co.*, 31 Bankr. 599 (W.D. Mich. 1983); *In re Otero Mills, Inc.*, 21 Bankr. 777 (Bankr. D.N.M. 1982), *aff'd*, 25 Bankr. 1018 (D.N.M. 1982). *See generally*, Han, *Testing the Limits of Judicial Discretion in*

the bankruptcy courts with broad equitable powers to take any action "necessary or appropriate" to carry out the provisions of the Code. 11 U.S.C. § 105(a). Courts in various circuits have pointed to section 105(a) as a basis of the bankruptcy court's power to release non-debtors when necessary for the debtor's reorganization, especially in cases where the non-debtor is contributing funding to the plan of reorganization. The propriety of this use of the bankruptcy court's power has been expressly approved by the courts of appeals in at least four circuits — the First, Second, Fourth, and District of Columbia Circuits.[8]

However, the Ninth Circuit, along with the Fifth, Seventh, and Tenth Circuits, have split from those other circuits by adopting a hard-and-fast rule that bankruptcy courts can never, under *any* circumstances, confirm reorganization plans that include the release of non-debtor third parties, even when their funding is crucial to the success of the reorganization.[9] This

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Chapter 11, 94 ANN. SURV. AM. L. 551 (1994); Cook & Brener, *Third-Party Releases in Chapter 11 Reorganization Plans*, 611 PLI/COMM. 369 (1992); Shapiro, *Non-Debtor Third Parties and the Bankruptcy Code: Is Protection Available Without Actually Filing?*, 95 COM. L.J. 345 (1990); Leal, *The Power of the Bankruptcy Court: Section 105*, 29 S. TEX. L. REV. 487 (1988).

8. See, e.g., *In re AOV Industries*, 792 F.2d 1140 (D.C. Circ. 1986) (non-debtor discharge is permissible when non-debtors contribute funds to the debtor and individual creditors can opt out of the plan provision which releases non-debtors); *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973 (1st Cir. 1995) (bankruptcy court has power to release non-debtors, in extraordinary circumstances, when it is essential to enable the formulation and confirmation of a reorganization plan). *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89 (2d Cir. 1988) (discharge of non-debtors is within the bankruptcy court's injunctive powers under section 105(a)); *In re A.H. Robins Company*, 880 F.2d 694 (4th Cir. 1989) (bankruptcy court has equitable power to enjoin suits against non-debtors which is essential to a workable reorganization).

9. E.g., *Feld v. Zale Corp.*, 62 F.3d 746 (5th Cir. 1995) (bankruptcy court does not have power to issue permanent injunction to relieve non-debtors from liability); *Union Carbide v. Newboles*, 686 F.2d 593 (7th Cir. 1982) (a bankruptcy court does not have the power to discharge the liabilities of a bankrupt's guarantors); *In re American Hardwoods, Inc.*, 885 F.2d 621 (9th Cir. 1989) (bankruptcy court lacks power to grant permanent injunction which would relieve non-debtor of liability because § 105(a) does not authorize relief inconsistent with more specific provisions of the Code (i.e., § 524(e)); *Underhill v. Royal*, 769 F.2d 1426, (9th Cir. 1985) (bankruptcy court has no

blanket prohibition is based on their reading of section 524(e) of the Bankruptcy Code, which states that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. §524(e).

As pointed out by the courts in other circuits, the language of section 524(e) merely recognizes that the discharge of a debtor does not, *by itself,* discharge anyone else. It does not expressly *prohibit* a bankruptcy court from discharging non-debtors in appropriate cases.[10]

This Court has previously noted the bankruptcy court's expansive authority under section 105(a) of the Bankruptcy Code. In the case of *United States v. Energy Resources Co., Inc.,* 495 U.S. 545, 110 S.Ct. 2139 (1990), this Court held that a bankruptcy court has the authority under section 105(a) to order the IRS to treat tax payments made by Chapter 11 debtor corporations as trust fund payments where the court determines that this designation is necessary for the success of the reorganization. The Court stated that such designation was appropriate, even though it was not specifically authorized by the Bankruptcy Code.[11] In addition, this Court has instructed

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power to discharge the liabilities of a nondebtor pursuant to the consent of creditors as part of a reorganization plan"); *In re Western Real Estate Fund,* 922 F.2d 592 (10th Cir. 1990) (bankruptcy court does not have power to issue permanent injunction to relieve non-debtors from liability).

10. See, e.g., *In the Matter of Specialty Equipment Companies, Inc.,* 3 F.3d 1043, 1046-1047 (7th Cir. 1993); *In re A.H. Robins, Inc.,* 880 F.2d 694, 702 (4th Cir. 1989); *Republic Supply Co. v. Shoaf,* 815 F.2d 1046, 1050 (5th Cir. 1987) (section 524(e) does not by its specific words preclude all non-debtor discharges, which have been accepted and confirmed as an integral part of a plan of reorganization).

11. As this Court stated in *Energy Resources,* 495 U.S. at 549:

> The Bankruptcy Code does not explicitly authorize the bankruptcy courts to approve reorganization plans designating tax payments as either trust fund or nontrust fund. The Code, however, grants the bankruptcy courts residual authority to approve reorganization plans including "any . . . appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. §1123(b)(5); see also §1129. The Code also states that bankruptcy courts may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Code. §105(a).

bankruptcy courts to "look at the entire statutory context for interpretory guidance" and to read the Code as a "holistic endeavor." *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 365, 371 (1988).

Nevertheless, the Fifth, Seventh, Ninth, and Tenth Circuits have interpreted section 524(e) as totally denying bankruptcy courts the equitable power to confirm releases or to issue permanent injunctions to relieve non-debtors of liability under any circumstances.

The present case is a prime example of how the Ninth Circuit's restrictive reading of section 524(e) has frustrated an otherwise workable plan of reorganization by refusing to permit the release of a non-debtor entity that is the major source of funding of the plan. The courts of appeals that follow this view are depriving the bankruptcy courts in their circuits of an equitable tool that may be needed to ensure the cooperation of third parties, upon whose assistance a successful reorganization may depend. Such an approach is contrary to the underlying purpose of Chapter 11 of the Bankruptcy Code, which is to facilitate the reorganization of the debtors.

It should be noted that, in Resorts' own reorganization proceeding, the New Jersey Bankruptcy Court confirmed a plan of reorganization that released non-debtors. *In re Resorts Int'l, Inc.*, 145 Bankr. 412, 421 (Bankr. D.N.J. 1990). It is patently inequitable that Resorts should reap the benefit of the court's equitable power to release non-debtors in the New Jersey Bankruptcy Court, yet object to the bankruptcy court's similar exercise of equitable power in this case.

A writ of certiorari should be granted because this is an issue of great importance to the administration of the Bankruptcy Code, on which the circuits are in sharp disagreement. SUP. CT. R. 10.1(a). It is an issue of first impression that has not, but should be, settled by this Court. SUP. CT. R. 10.1(c). *See Reading Company v. Brown*, 391 U.S. 471, 475 (1968). Furthermore, in view of the absolute prohibition of non-debtor releases laid down by the Court of Appeals, this may well be

the last such case that will ever come out of the Ninth Circuit.[12]

A. Bankruptcy Courts Should Have the Equitable Power, in Appropriate Cases, To Release Non-Debtors and To Enjoin Actions against Them.

Many courts that permit non-debtor releases have followed the reasoning in *In re Otero Mills, Inc.*, 21 Bankr. 777 (Bankr. D.N.M. 1982), *aff'd*, 25 Bankr. 1018 (D.N.M. 1982).[13] In *Otero Mills*, the debtor requested an injunction to prevent a creditor from proceeding in state court on a debt guaranteed by the debtor's president and shareholder. The bankruptcy court held it had the power under section 105(a) to enjoin a party from proceeding in state court against a non-debtor where the state proceeding was related to a case arising under Chapter 11. *Id.* at 778.

The *Otero Mills* court recognized that the power to enjoin actions against third parties was limited:

> "To so enjoin a creditor's action against a third party, the court must find that the failure to enjoin would affect the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through that third party .... This power to enjoin assures that a creditor may not do indirectly that which he is forbidden to do directly." *Ibid.*

According to *Otero Mills*, a debtor must show the following in order for an injunction against third parties to be sustained: (1) irreparable harm to the estate; (2) likelihood of a successful

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12. This Court has denied or dismissed certiorari in cases in which the release of non-debtors had been affirmed. *See A.H. Robins Co. v. Mabey*, 880 F.2d 694 (4th Cir. 1989), cert. denied sub nom., *Menard-Sanford v. A.H. Robins Co.*, 493 U.S. 959 (1989); *In re Drexel Burnham Lambert Group*, 960 F.2d 285 (2d Cir. 1992), cert. dismissed, sub nom., *Hart Holding Co. v. Drexel Burnham Lambert Group*, 113 S. Ct. 1070 (1993); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988), cert. denied, 488 U.S. 868 (1988). Petitioner is not aware of any petitions for certiorari from cases in circuits that forbid the use of non-debtor releases, other than the present one.

13. *See generally*, 2 COLLIER ON BANKRUPTCY ¶105.02 (15th ed. 1995).

reorganization; and (3) no harm or minimal harm to the other party. *Id.* at 778-779.

In the case of *In re Chateaugay Corporation*, 167 Bankr. 776 (S.D.N.Y. 1994), the court discussed at length the issue of whether the bankruptcy court may permanently release a non-debtor from liability to third parties. In *Chateaugay*, the district court remanded the case to the bankruptcy court to determine whether the release would actually impact third-party rights, or whether the release was essential to the plan.[14] The court determined that if the claims that were released were baseless or without merit, the third-party claimant would suffer no prejudice.

In the present case, all the elements of the *Otero Mills* test were present and could have been fully supported on the record if the case had been remanded for further hearings.[15] However, as long as the Ninth Circuit's blanket prohibition remains in

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14. The *Chateaugay* court stated that if the release was found to be essential to the plan of reorganization, then it could be authorized under section 105 of the Bankruptcy Code. *In re Chateaugay Corporation*, 167 Bankr. 776, 780 (S.D.N.Y. 1994).

15. The first element of *Otero Mills* would be met because the release of the Pension Plan — the primary funding source — is essential to confirmation and implementation of the plan. This was especially true in view of the section 105 injunction that Resorts had obtained from the New Jersey Bankruptcy Court against the Pension Plan's trustee, and which Resorts was attempting to enforce. The Nevada District Court, in staying its order, recognized that permitting Resorts to proceed against the Pension Plan would cause irreparable harm to the reorganization. Appendix at 46a-47a.

The second factor would be met because funding by the Pension Plan has enabled creditors to receive substantially more than they would have received under a Chapter 7 liquidation and allows for a successful reorganization under Chapter 11.

Finally, there would be no harm or minimal harm to Resorts, which had an opportunity to litigate its claims in the Nevada Bankruptcy Court and refused to do so. Resorts' withdrawal with prejudice of its claims against Lowenschuss is the functional equivalent of a judgment in favor of Lowenschuss on the merits. Resorts would therefore be precluded by the doctrine of collateral estoppel from litigating the same issues against the Pension Plan. This is especially true because Resorts' claims were based upon acts performed by Lowenschuss as an agent of the Pension Plan. Generally, a judgment in favor of an agent precludes a similar claim against his principal. *See, e.g., Spector v. El Ranco, Inc.*, 263 F.2d 143, 145 (9th Cir. 1959); 46 AM.JUR.2D, *Judgments*, § 565, p. 726.

effect, no hearings on the appropriateness of non-debtor releases will ever be held — either in this case or any other. Therefore, petitioner respectfully requests that the decision of the Court of Appeals be reversed and the case remanded for whatever hearings may be appropriate on this issue.

B. Congress Did Not Intend Section 524(e) To Preclude Bankruptcy Courts from Releasing Non-debtors or Enjoining Actions against Them.

Congress appears to have favored the approach of the Second Circuit in the *Johns-Manville* case with respect to non-debtor discharges in asbestos cases. In response to that decision, Congress added section 524(g) of the Bankruptcy Code in 1994. Section 524(g) specifically provides a structured framework in which injunctions may be issued where a trust fund has assumed the debtor's asbestos-related liabilities.

The congressional committee report accompanying this bill specifically noted in the record that the injunction mechanism prescribed in § 524(g) was "not intended to alter any existing authority bankruptcy courts may already have to issue injunctions in connection with a plan of reorganization."[16] There-

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16. The Committee stated:

> Section 111 [of the bill] contains a rule of construction to make clear that the special rule being devised for the asbestos claim trust/injunction mechanism is not intended to alter *any authority bankruptcy courts may already have to issue injunctions in connection with a plan of reorganization.* Indeed, Johns-Manville and UNR firmly believe that the court in their cases had full authority to approve the trust/injunction mechanism. And other debtors in other industries are reportedly beginning to experiment with similar mechanisms. *The Committee expresses no opinion as to how much authority a bankruptcy court may generally have under its traditional equitable powers to issue an enforceable injunction of this kind.* The Committee has decided to provide explicit authority in the asbestos area because of the singular cumulative magnitude of the claims involved. How the new statutory mechanism works in the asbestos area may help the Committee judge whether the concept should be extended into other areas. (Emphasis added.)

140 Cong. Rec. H 10,765 (October 4, 1994).

fore, the legislative history surrounding § 524(g) makes it clear that Congress did not view § 524(e) as an absolute prohibition of non-debtor releases in plans of reorganization.

II. THE NINTH CIRCUIT, IN FINDING THAT THE BANKRUPTCY COURT ABUSED ITS DISCRETION IN REQUIRING A CREDITOR EITHER TO TRY ITS CLAIM OR TO WITHDRAW THE CLAIM UNCONDITIONALLY WITH PREJUDICE, IMPROPERLY IMPAIRED THE ABILITY OF BANKRUPTCY COURTS TO CONTROL THEIR OWN DOCKETS.

The Ninth Circuit held that, although Resorts voluntarily withdrew its claim with prejudice against Lowenschuss, it should have been permitted to withdraw with the condition that it be able to reassert the claim at some future time. However, this ruling is contrary to the authority of the bankruptcy court pursuant to FED. R. BANKR. P. 3006, to attach such terms and conditions to the withdrawal of a claim as the bankruptcy court deems proper.[17] The Ninth Circuit's ruling on this issue is also contrary to the law of the various circuits.[18]

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17. FED. R. BANKR. P. 3006 states:

> . . . If after a creditor has filed a proof of claim an objection is filed thereto or a complaint is filed against that creditor in an adversary proceeding, or the creditor has accepted or rejected the plan or otherwise has participated significantly in the case, the creditor may not withdraw the claim except on order of the court after a hearing . . . . *The order of the court shall contain such terms and conditions as the court deems proper.* Unless the court orders otherwise, an authorized withdrawal of a claim shall constitute withdrawal of any related acceptance or rejection of a plan. (Emphasis added.)

18. *Smith & Smith v. Bowsmith, Inc.*, 976 F.2d 737 (9th Cir. 1992) (Rule 3006 vests discretion in the court to grant, deny or condition a creditor's withdrawal) ; *Kern v. Tyo Production Corp.*, 738 F.2d 968 (8th Cir. 1984) (a court may condition a motion to dismiss, which will not be disturbed unless it is not within the range of choices or influenced by any mistake of law); *Gravatt v. Columbia University*, 845 F.2d 54 (2d Cir. 1988) (court converted a motion to dismiss without prejudice to a motion to dismiss with prejudice).

As the dissenting opinion of Judge Fernandez strongly pointed out, Resorts was not forced to withdraw its claim with prejudice but was given an opportunity to go forward with its claim, which it chose not to do.

> Of course, the bankruptcy court did not require Resorts to withdraw its claim with prejudice after Resorts had merely made a voluntary withdrawal motion. That court, at all times, afforded Resorts the right to go forward with its claim, even though Resorts thought that might turn out to be a useless act. [FN1: I am dubious about Resorts's premise. By any account, Lowenschuss, the alleged wrongdoer, was the trustee, administrator, and sole beneficiary of the Pension Plan. Could it be that the Plan would not be bound by an adjudication that he had committed fraud when he engaged in the redemption transaction on its behalf? I doubt it.] If Resorts thought that withdrawal of its claim without the special conditions it demanded would be too burdensome, it could have proceeded with a case on the merits. *See Lau v. Glendora Unified School District.*, 792 F.2d 929, 930-31 (9th Cir. 1986)(per curiam order); *see also Gravatt v. Columbia Univ.*, 845 F.2d 54, 56 (2nd Cir. 1988). [Fernandez, J., concurring and dissenting, Appendix at 22a.]

The Bankruptcy Court recognized that granting Resorts' motion would jeopardize the reorganization plan. The feasibility of the reorganization depended upon funding by the Pension Plan. Therefore, until Resorts' claim was adjudicated or Resorts withdrew its claim with prejudice, the feasibility of the reorganization would be in doubt. This uncertainty was compounded by the New Jersey Bankruptcy Court's section 105 injunction, based on Resorts' claim, which restricted the trustee's ability to make payments from the Pension Plan. If Resorts were permitted to withdraw its claims with the condition that they could later be refiled, the determination of the plan's feasibility would be placed in limbo until Resorts decided it was ready to adjudicate its claims.

If Resorts wanted to resolve its claims on the merits, it should have litigated them against the Pension Plan in the

Nevada Bankruptcy Court, so that court could determine whether the claim would affect the feasibility of the reorganization plan. When Resorts' chose instead to withdraw its claim with prejudice, the Bankruptcy Court had the right to control its own docket by specifying the conditions upon which Resorts' withdrawal would be acceptable. The Court was justified in requiring the finality of this withdrawal, in order to proceed with its consideration of the proposed reorganization plan. The bankruptcy court's docket should not be held hostage by a creditor who seeks the privileges of remaining a party without the responsibility of litigating its claim.[19]

III. RESORTS' APPEAL TO THE DISTRICT COURT SHOULD HAVE BEEN DISMISSED AS MOOT BECAUSE RESORTS FAILED TO SEEK A STAY OF THE CONFIRMATION ORDER, ALLOWING THE REORGANIZATION PLAN TO BE FULLY IMPLEMENTED.

Resorts' appeal to the district court should have been dismissed as moot because Resorts failed to seek a stay of the confirmation order, permitting the Pension Plan to make substantial payments under the reorganization plan which cannot now be recovered.

The doctrine of mootness arises from the constitutional limitation that Article III courts hear only live cases and controversies. *Mills v. Green*, 159 U.S. 651, 653 (1895). Therefore, if

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19. In his dissenting opinion, Judge Fernandez of the Court of Appeals stated:

> [Resorts] wanted to retain all of the rights of a party to the case while avoiding the necessity of a trial. In other words, Resorts claims that it should be allowed to tell the bankruptcy court if and when that court is permitted to adjudicate the basic issue in the Lowenschuss reorganization: did Mr. Lowenschuss himself commit fraud upon Resorts either for his own benefit or for someone else's? The bankruptcy court said that the time had come to try that issue, but Resorts disagreed. Resorts wanted to decide when and where it would pursue its assertion that Lowenschuss committed a wrong, but it never for one moment eschewed the pursuit. It wanted to control the bankruptcy court's calendar. [Appendix at 21a—22a.]

a court is unable to fashion effective relief, it must dismiss an action as moot. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990).

The mootness doctrine is especially relevant in bankruptcy proceedings, where public policy favors that, in the absence of a stay, court-approved reorganizations go forward. *In re Revere Copper and Brass Inc.*, 78 Bankr. 17, 21 (S.D.N.Y. 1987). Bankruptcy Rule 8005, which outlines the procedure for obtaining a stay pending appeal, does not mandate that a petitioner seek a stay pending an appeal; however, "[t]he party who appeals without seeking to avail himself of that protection does so at his own risk." *In re Chateaugay Corp.* 988 F.2d 322, 326 (2d Cir. 1993). *See also In re Texaco Inc.*, 92 Bankr. 38, 45 (S.D.N.Y. 1988); *In re Revere*, supra, 78 Bankr. at 22.

Where a stay has not been sought and reversal would destroy the work of the bankruptcy court, the appeal should be dismissed as moot. In addition, when the requested relief would be inequitable or impractical in light of the change in circumstances, the appeal should be dismissed as moot. *In re Public Serv. Co.*, 963 F.2d 469, 472 (1st Cir. 1992) *cert. denied, sub nom., Rochman v. Northeast Utils. Serv. Co.*, 113 S.Ct. 304 (1992); *In re Roberts Farms,* 652 F.2d 793 (9th Cir. 1981).

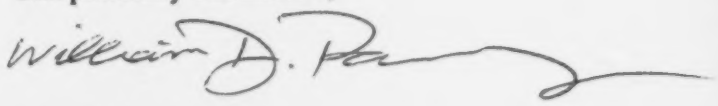
Because of Resorts failure to seek a stay of the confirmation order, the plan of reorganization was fully implemented and has been substantially consummated. Therefore, Resorts' appeal to the district court should have been dismissed as moot.

CONCLUSION

This case presents important issues of first impression concerning the administration of the Bankruptcy Code, on which the courts of appeal of the various circuits are deeply divided. This is a particularly appropriate opportunity for the Supreme Court to address these issues, because this is likely to be the last case from the Ninth Circuit involving non-debtor releases, due to the blanket prohibition expressed in the Court of Appeals' opinion.

For all of the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In Re: FRED LOWENSCHUSS,
Debtor.

No. 94-16287

RESORTS INTERNATIONAL, INC.
Appellee,

D.C. No.
CV-93-00738-HDM

v.

OPINION

FRED LOWENSCHUSS,
Appellant

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Argued and Submitted
July 12, 1995—San Francisco, California

Filed October 10, 1995

Before: Herbert Y.C. Choy, William C. Canby,
and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Choy; Partial Concurrence and
Partial Dissent by Judge Fernandez

SUMMARY

Bankruptcy/Litigation and Procedure (Civil)/ Corporate Reorganization (Chapter 11)

The court of appeals affirmed a district court judgment. The court held that the bankruptcy court committed a clear error of judgment in denying a request for conditional withdrawal of proofs of claim.

Appellant Fred Lowenschuss established Fred Lowenschuss Associates, which had a Pension Plan for employees. Lowenschuss acted as trustee and administrator of the Plan, which had substantial holdings in stocks and bonds of appellee Resorts International, Inc.

Resorts sued Lowenschuss, claiming that he willfully and intentionally defrauded Resorts by tendering shares of Resorts stock while knowing that an appraisal proceeding was pending. By the time Resorts's amended complaint was filed, Resorts had filed for Chapter 11 reorganization in the United States Bankruptcy Court for the District of New Jersey. Resorts's action against Lowenschuss was removed to the New Jersey Bankruptcy Court. The New Jersey Bankruptcy Court granted in part Resorts's cross-motion for summary judgment finding that the transaction between Resorts and Lowenschuss was an illegal contract. Because the New Jersey Bankruptcy Court could not ascertain the location of the money received in exchange for the allegedly illegally tendered Resorts stock, it entered an order broadly applying to Lowenschuss.

Lowenschuss commenced a voluntary Chapter 11 reorganization in the United States Bankruptcy Court for the District of Nevada. Resorts's action against Lowenschuss in the New Jersey Bankruptcy court was automatically stayed. Lowenschuss filed a Reorganization Plan, which included a "Global Release" provision releasing numerous parties, including Lowenschuss

and the Pension Plan, from all claims upon confirmation of the Reorganization Plan. Resorts, believing that the transferred money might constitute property of Lowenschuss's bankruptcy estate, asserted itself as a creditor. Resorts filed two proofs of claim. As a basis for the claims, Resorts annexed copies of its complaint against Lowenschuss. Lowenschuss filed an objection to Resorts's claims. The Nevada Bankruptcy Court ruled that the Pension Plan was exempt from Lowenschuss's bankruptcy estate. Resorts filed an objection to the confirmation of the Reorganization Plan, arguing that the bankruptcy court did not have the power to grant the Global Release Provision because the provision purported to release claims against non-debtors, such as the Pension Plan. The Nevada Bankruptcy Court ruled that the Global Release Provision was improper and could not release non-debtors such as the Pension Plan.

Resorts moved to withdraw its proofs of claim from Lowenschuss's bankruptcy proceedings without prejudice and with certain conditions. Resorts had ascertained that the Pension Plan held the allegedly illegally transferred funds. Resorts sought to withdraw conditionally, such that 1) it could reinstate its proofs of claim if the Pension Plan Exemption Order were reversed or the bankruptcy court consolidated the Pension Plan with Lowenschuss's estate and 2) it would remain a party in interest in the case. The Nevada Bankruptcy Court denied Resorts's motion to withdraw conditionally and gave Resorts a choice between withdrawing its claim with prejudice and without conditions or proceeding to litigate its claim against Lowenschuss's bankruptcy estate on the merits. Resorts hesitated, and the court denied the motion to withdraw. Resorts's emergency motion for a stay or further proceedings was denied.

Resorts moved to withdraw unconditionally its proofs of claim from Lowenschuss's bankruptcy estate with prejudice. The Nevada Bankruptcy Court granted the motion. The Nevada Bankruptcy Court confirmed Lowenschuss's Reorganization Plan, including the Global Release Provision. The court also

retained jurisdiction over future litigation between Resorts and Lowenschuss's interest in the Pension Plan. The question of retaining jurisdiction appeared for the first time in the signed confirmation order. Resorts appealed the Nevada Bankruptcy Court's orders.

The district court ruled in Resorts's favor, holding that the bankruptcy court abused its discretion by refusing to allow Resorts to withdraw conditionally its proofs of claim. The court also vacated the Global Release Provision, finding that the bankruptcy court lacked the authority to discharge the liabilities of non-debtors, including the Pension Plan. The court also vacated the bankruptcy court's assertion of jurisdiction over Resorts's future litigation against the non-debtor Pension Plan. Lowenschuss appealed.

[1] The bankruptcy court's refusal to permit Resorts to withdraw conditionally its proofs of claim was appealable.

[2] The Nevada Bankruptcy Court appeared to have denied summarily Resorts's request for a conditional withdrawal in its hurry to settle all of Resorts's claims against Lowenschuss's estate without considering "what interests" were "at stake." [3] The bankruptcy court denied the conditional withdrawal without addressing any of Resorts's arguments and without finding that Lowenschuss would be prejudiced legally by a conditional dismissal. [4] In addition, there was no evidence that Lowenschuss would be prejudiced legally by a dismissal of Resorts's proofs of claim without prejudice. [5] Thus, the Nevada Bankruptcy Court committed a clear error of judgment in denying Resorts's request for a conditional withdrawal. Accordingly, the district court's reversal of that denial was affirmed.

[6] Lowenschuss's Reorganization Plan contained a provision broadly releasing the debtor and connected persons or entities, including the Pension Plan, from claims. [7] The statute that provides that discharges under Chapter 11 release the debtor from personal liability for any debts, however, does not

provide for the release of *third parties* from liability. [8] The Ninth Circuit has repeatedly held that a section of that statute precludes bankruptcy courts from discharging the liabilities of non-debtors. [9] Thus, the district court's decision vacating the Global Release Provision was affirmed.

[10] Lowenschuss waived consideration of the issue of whether the bankruptcy court improperly retained jurisdiction over future litigation of Resorts's claim against the Pension Plan. He failed to argue the issue in either his opening or reply brief.

Circuit Judge Fernandez concurred and dissented, stating that Resorts was not entitled to a voluntary dismissal with prejudice with a guarantee that it could stay in the fray at the same time.

COUNSEL

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Mitchell A. Karlan, Gibson, Dunn & Crutcher, New York, New York, for the appellee.

OPINION

CHOY, Circuit Judge:

Fred Lowenschuss appeals the district court's reversal of the bankruptcy court's decision. The district court held that the bankruptcy court erred when it (1) refused to allow Resorts International, Inc. ("Resorts") to withdraw its proofs of claim from Lowenschuss's bankruptcy proceedings without prejudice; (2) discharged all claims against the Fred Lowenschuss Associates Pension Plan (the "Pension Plan") when it confirmed Low-

enschuss's Chapter 11 reorganization plan (the "Reorganization Plan"); and (3) retained jurisdiction over litigation between Resorts and the Pension Plan regarding an allegedly unauthorized transfer of money in exchange for Resorts stock. We affirm the district court's decision.

I.

In 1970, Lowenschuss established Fred Lowenschuss Associates, a professional corporation, with a Pension Plan for all employees of Fred Lowenschuss Associates. During the time period relevant to this appeal, Lowenschuss has been the trustee, administrator, sponsor, and sole beneficiary of the Pension Plan.[1] The Pension Plan held assets valued in the neighborhood of $8,000,000, which included substantial holdings in Resorts stocks and bonds.

Resorts's complaint

On September 26, 1989, Resorts filed an action against Lowenschuss, individually and as trustee of the Fred Lowenschuss IRA and the Laurance Lowenschuss IRA, in the United States District Court for the Eastern District of Pennsylvania.[2] Resorts claimed that Lowenschuss willfully and intentionally defrauded Resorts of $3,805,200 by tendering shares of Resorts stock for $36 per share when he knew that an appraisal proceeding was pending. Resorts sought to rescind the transaction

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1. In July of 1991, Laurance Lowenschuss began acting as a trustee of the Pension Plan.

2. The caption has been modified by the New Jersey Bankruptcy Court. which took over the case, to include Lowenschuss individually and as trustee of the Pension Plan as defendants in the action. *Resorts Int'l., Inc. v. Lowenschuss (In re Resorts Int'l, Inc.)*. Nos. 89-10119. 89-10120, 89-10461. 89-10462 (Bankr. D.N.J. June 13, 1995). The Order clarifies that the trustee of the Pension Plan "is and has been a party to this action." Id. at 2.

on the grounds of unilateral mistake, fraud, and illegality of contract. On November 1, 1990, Resorts amended its complaint, adding claims for fraudulent conveyance.

By the time the amended complaint was filed, Resorts had filed for Chapter 11 reorganization in the United States Bankruptcy Court for the District of New Jersey ("New Jersey Bankruptcy Court"). Accordingly, Resorts's action against Lowenschuss was removed to the New Jersey Bankruptcy Court.

On February 9, 1992, the New Jersey Bankruptcy Court denied Lowenschuss's motion for summary judgment and/or dismissal of Resorts's complaint and granted in part Resorts's cross-motion for summary judgment, finding that the transaction between Resorts and Lowenschuss was an illegal contract. The court left the remedies of recision and restitution open for trial.

On June 16, 1992, because the New Jersey Bankruptcy Court could not ascertain the location of the money received in exchange for the allegedly illegally tendered Resorts stock, in order to enjoin the dissipation or transfer of the money, it entered an order which broadly applied to Lowenschuss, both personally and as the representative or trustee of "any fund," including the Fred Lowenschuss IRA, the Laurance Lowenschuss IRA, and the Pension Plan.

Lowenschuss Files for Chapter 11 Reorganization

On August 24, 1992, Lowenschuss commenced a voluntary Chapter 11 reorganization in the United States Bankruptcy Court for the District of Nevada ("Nevada Bankruptcy Court"). Resorts alleges that it was prepared to try its New Jersey fraud case against Lowenschuss weeks before Lowenschuss filed for Chapter 11. Upon the commencement of Lowenschuss's Chapter 11 bankruptcy in the Nevada Bankruptcy Court, Resorts's action against Lowenschuss in the New Jersey Bankruptcy Court was automatically stayed pursuant to 11 U.S.C. § 362(a).

On March 8, 1993, Lowenschuss filed a Disclosure Statement and a Reorganization Plan. These documents revealed that Lowenschuss's ex-wife, Beverly Selnick, was the largest creditor in Lowenschuss's bankruptcy estate with a claim of $5.3 million. The Disclosure Statement indicated that Resorts's New Jersey action against the Pension Plan was a primary reason for Lowenschuss's Chapter 11 filing and classified the action as litigation affecting the bankruptcy estate.

The Reorganization Plan included a "Global Release" provision, which released numerous parties, including Lowenschuss and the Pension Plan, from all claims upon confirmation of the Reorganization Plan. Furthermore, the Reorganization Plan provided that it was being funded both by Lowenschuss's income from the Pension Plan and by the Pension Plan directly.

On May 25, 1993, Resorts, believing that the transferred money might constitute property of Lowenschuss's bankruptcy estate, asserted itself as the second largest creditor. Resorts filed two proofs of claim, one in an unliquidated amount, and the other in the amount of $3,805,200 plus interest. As the basis for the claims, Resorts annexed copies of its complaint and amended complaint against Lowenschuss. On June 24, 1993, Lowenschuss filed an objection to Resorts's claims on the grounds that (1) the claim has no legal basis because shareholders were permitted to withdraw their claim for appraisal and surrender shares for payment; (2) the claim has no legal basis because Resorts paid no money to Debtor, (3)in Resorts's bankruptcy proceeding, the judge entered a global release which released all shareholders who received $36 a share from all possible claims; (4) Resorts or its designee received full consideration for any payment made by receipt of stock in Resorts; and (5) Resorts received the same payment for stock from the Pension Plan as it did from all other shareholders who tendered stock.

On July 21, 1993, the Nevada Bankruptcy Court ruled that the Pension Plan was exempt from Lowenschuss's bankruptcy

estate. *In re Lowenschuss*, No. BK-N-92-3174-JHT at 3 (Bankr. D. Nev. July 21, 1993)(the "Pension Plan Exemption Order").[3]

On September 17, 1993, Resorts filed an objection to the confirmation of the Reorganization Plan, arguing that the bankruptcy court does not have the power to grant the Global Release Provision because the provision purports to release claims against non-debtors, such as the Pension Plan. At the September 23, 1993 hearing on objections to the proposed plan, the Nevada Bankruptcy Court ruled that the Global Release Provision was improper and held that the Provision could not release non-debtors such as the Pension Plan.

The trial on Resorts's claim against Lowenschuss's bankruptcy estate had been postponed until October 14, 1993. Two weeks before the trial was to take place, Resorts moved to withdraw its proofs of claim from Lowenschuss's bankruptcy proceedings without prejudice and with certain conditions.[4] By this time, Resorts had ascertained that the Pension Plan, which had been exempted from Lowenschuss's bankruptcy estate, held

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3. On August 19, 1994, the Nevada District Court vacated the Pension Plan Exemption Order and remanded for further fact-finding. *Selnick v. Lowenschuss (In re Lowenschuss)*, No. CV-N-93-565-ECR (Bankr. D. Nev. Aug. 19, 1994). When Lowenschuss appealed from this ruling, this court dismissed the appeal for lack of appellate jurisdiction. *Selnick v. Lowenschuss (In re Lowenschuss)*, No. 94-16618 (9th Cir. Dec. 9, 1994). Consequently, to this date, the issue of whether the Pension Plan, or Lowenschuss's interest in the plan, is property of the Lowenschuss bankruptcy estate remains unresolved.

4. Technically, in its motion to withdraw its proofs of claim, Resorts requested withdrawal *with* prejudice, but the conditions that it requested — that it be permitted to reinstate its proofs of claim in the bankruptcy estate should the Pension Plan become part of the estate upon a reversal of the bankruptcy court's Pension Plan Exemption Order and that it remain a party in interest to the bankruptcy — rendered its request the functional equivalent of a motion to withdraw *without* prejudice. Accordingly, we treat the requested withdrawal as such. Even Lowenschuss concedes that Resorts originally sought to withdraw without prejudice. See Brief of Appellee at 7, 8.

the allegedly illegally transferred funds. And on September 23, 1993, the Nevada Bankruptcy Court had ruled that the Reorganization Plan could not grant general releases to non-debtors like the Pension Plan. In light of these rulings, and because Resorts's complaint was essentially against the Pension Plan, Resorts argued that it would be futile for it to litigate against Lowenschuss's bankruptcy estate and unnecessary for it to continue to assert itself as a creditor in his bankruptcy estate. Resorts sought to withdraw conditionally, such that (1) it could reinstate its proofs of claim if that the Pension Plan Exemption Order were reversed on appeal or the bankruptcy court later consolidated the Pension Plan with the Debtor's estate; and (2) it would remain a party in interest in the case.

A hearing was held on Resorts's motion to withdraw its proofs of claim on October 12, 1993. At the hearing, the Nevada Bankruptcy Court denied Resorts's motion to withdraw conditionally and gave Resorts a choice between withdrawing its claim with prejudice and without conditions or proceeding to litigate its claim against Lowenschuss's bankruptcy estate, as it was then constituted, on the merits. When Resorts hesitated, the court denied the motion to withdraw. Resorts appealed this ruling and moved to stay further proceedings pending the appeal. On October 13, 1993, the Nevada District Court denied Resorts's emergency motion for a stay of further proceedings.

On October 14, 1993, the day the hearing on Resorts's claim was scheduled to begin, Resorts moved to withdraw unconditionally its proofs of claim from Lowenschuss's bankruptcy estate with prejudice. Over Lowenschuss's objections, the Nevada Bankruptcy Court granted the motion.

On October 27, 1993, the confirmation hearing for Lowenschuss's Reorganization Plan was held. Lowenschuss's counsel presented the originally proposed Reorganization Plan, which included the Global Release Provision that Resorts previously had disputed. Lowenschuss's counsel justified the reintroduction of the original plan by arguing that Resorts was no

longer a creditor and its objections should be ignored. When Resorts attempted to protest the confirmation, the Nevada Bankruptcy Court denied Resorts an opportunity to speak, reasoning that Resorts was no longer a party to the bankruptcy.

On October 28, 1993, the Nevada Bankruptcy Court confirmed Lowenschuss's Reorganization Plan, including the Global Release Provision. Furthermore, in the Confirmation Order, the bankruptcy court retained jurisdiction over future litigation between Resorts and Lowenschuss, individually and/or as trustee of the Pension Plan, and Lowenschuss's interest in the Pension Plan. Since the question of retaining jurisdiction appeared for the first time in the signed Confirmation Order, Resorts was never given an opportunity to object.

District Court's Ruling

Resorts appealed the Nevada Bankruptcy Court's Orders of October 12, 14, and 28, 1993. On June 9, 1994, the Nevada District Court ruled in Resorts's favor, holding that the bankruptcy court abused its discretion when it refused to allow Resorts to withdraw conditionally its proofs of claim. The district court reasoned that Resorts should have been permitted to withdraw with the condition that if the Pension Plan Exemption Order were reversed, it could reassert its proofs of claim.

The district court also vacated the Global Release Provision, finding that the bankruptcy court had no authority to discharge the liabilities of non-debtors, including the Pension Plan.

Finally, the district court vacated the bankruptcy court's assertion of jurisdiction over Resorts's future litigation against the non-debtor Pension Plan. The district court ruled that the bankruptcy court cannot assert jurisdiction over litigation between third parties, such as Resorts and the Pension Plan, where the litigation will not affect the bankruptcy estate.

Lowenschuss timely appealed the district court's decision,

and we have jurisdiction pursuant to 28 U.S.C. §§ 158(d) and 1291.

II.

A. RESORTS'S VOLUNTARY WITHDRAWAL WITH PREJUDICE

1. *Mootness*

First, we must consider whether Resorts's appeal from the bankruptcy court's refusal to permit Resorts to withdraw without prejudice its proofs of claim from Lowenschuss's bankruptcy estate is mooted by Resorts's subsequent voluntary unconditional withdrawal with prejudice.

[1] Just as a plaintiff may appeal a voluntary dismissal *without* prejudice when the trial court has imposed a legally prejudicial condition on the dismissal, *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 603-04 (5th Cir. 1976), so too may a plaintiff appeal a voluntary dismissal *with* prejudice. *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 556 (9th Cir. 1986) ("a dismissal with prejudice ... [is] appealable, whether voluntary or involuntary.") (citation omitted), *cert. denied*, 484 U.S. 822 (1987), *and cert. denied*, 484 U.S. 823 (1987); *see also Coursen v. A.H. Robins Co.*, 764 F.2d 1329, 1342 (9th Cir. 1985), *corrected*, 773 F.2d 1049 (9th Cir. 1985) ("While a plaintiff cannot appeal a voluntary dismissal without prejudice [unless a condition is imposed that creates legal prejudice], he or she may appeal a dismissal with prejudice."). The bankruptcy court's refusal to permit Resorts to withdraw conditionally its proofs of claim is therefore appealable.

Contrary to Lowenschuss's argument, we are in position to fashion effective and equitable relief for Resorts on this issue. *See Spiritos v. Moreno (In re Spiritos)*, 992 F.2d 1004, 1007 (9th Cir. 1993). We find that the bankruptcy court abused its discretion by refusing to allow Resorts to withdraw its proofs of claim

from Lowenschuss's bankruptcy estate without prejudice. We therefore reverse this refusal. The bankruptcy court provided Resorts with no real alternative but to withdraw its proofs of claim with prejudice and without conditions. Resorts attempted to stay the bankruptcy court's order refusing a conditional withdrawal pending its appeal of the ruling, but to no avail. We can fashion effective relief by requiring that Resorts's withdrawal is without prejudice, with the requested conditions. If the Nevada Bankruptcy Court determines that the Pension Plan is part of Lowenschuss's estate, Resorts will be entitled to reinstate its proofs of claim.

2. *The bankruptcy court's refusal of Resorts's request for a conditional withdrawal*

We review de novo the district court's decision on an appeal from a bankruptcy court, applying the same standard of review to the bankruptcy court's findings as did the district court. *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1166 (9th Cir. 1990). We review for abuse a bankruptcy court's exercise of discretion over a creditor's voluntary withdrawal of claims. *See Koch v. Hankins*, 8 F.3d 650, 652 (9th Cir. 1993) ("district court's determination of the terms and conditions of dismissal under Fed. R. Civ. P. 41(a)(2) is reviewed for abuse of discretion."); *see also Lawler v. Guild, Hagen & Clark, Ltd., (In re Lawler)*, 106 B.R. 943, 951 (Bankr. N.D. Tex. 1989) (bankruptcy court's decision to grant withdrawal of proof of claim subject to review for abuse of discretion).

We recognize that the bankruptcy court's exercise of discretion should not be disturbed unless we have " 'a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.' " *Moneymaker v. CoBen (In re Eisen)*, 31 F.3d 1447, 1451 (9th Cir. 1994) (quoting *Nealey v. Transportacion Maritima Mexicana, S.A.*, 662 F.2d 1275, 1278 (9th Cir. 1980)).

Federal Rule of Bankruptcy Procedure 3006, which is governed by the same considerations underlying Federal Rule of Civil Procedure 41(a)(2), provides that voluntary dismissals should be granted only upon an order of the bankruptcy court which "shall contain such terms and conditions as the court deems proper." Fed. R. Bankr. P. 3006; *see id.,* Advisory Committee Note (1984). In deciding whether to grant a voluntary dismissal, a trial court must consider whether the defendant will suffer legal prejudice as a result of the court's dismissal. *See Hyde & Drath v. Baker,* 24 F.3d 1162, 1169 (9th Cir. 1994), *see also LeCompte,* 528 F.2d at 604 ("[We] follow the traditional principle that dismissal should be allowed unless the defendant will suffer some plain prejudice *other than the mere prospect of a second lawsuit.*") (emphasis in original) (citations omitted) (cited with approval in *Unioil,* 809 F.2d at 556).

In *LeCompte,* 528 F.2d at 602, the plaintiff requested a voluntary dismissal without prejudice. In granting the dismissal, the district court attached several conditions, one of which was a requirement that the plaintiff preliminarily prove his case before relitigating. Id. at 604. The Fifth Circuit vacated and remanded the conditional dismissal because the district court failed to consider whether the defendant would be prejudiced legally by an unconditional dismissal and because, if such prejudice existed, the court failed to explain how the imposition of its conditions would alleviate legal prejudice to the defendant. The district court was instructed to "better determine what interests are at stake and to fashion only such conditions as are necessary to protect the legitimate interest of defendants." Id. at 605.

[2] *LeCompte* is instructive on the issue at bar. The Nevada Bankruptcy Court appears to have denied summarily Resorts's request for a conditional withdrawal in its hurry to settle all of Resorts's claims against Lowenschuss's estate without considering "what interests are at stake." Id. The bankruptcy court did not consider adequately the fact that, at the time of

its ruling, Resorts would have been litigating against the wrong defendant if it had gone ahead with the trial against Lowenschuss's bankruptcy estate because the Pension Plan had been exempted from the estate. Nor did the bankruptcy court properly consider the fact that dismissing Resorts's proofs of claim with prejudice would preclude Resorts from asserting its interest against the Pension Plan if the Pension Plan Exemption Order later were reversed and the Pension Plan again became a part of Lowenschuss's bankruptcy estate. Nor did the district court consider whether Lowenschuss would be prejudiced legally by permitting Resorts to withdraw conditionally.

[3] The following excerpt from the hearing transcript supports the conclusion that the bankruptcy court denied the conditional withdrawal without addressing any of Resorts's arguments and without finding that Lowenschuss would be prejudiced legally by a conditional dismissal:

> Mr. Goodenow [Resorts's counsel]: And all our motion asks for, your Honor, is that we be allowed to withdraw the claim with prejudice with the condition that we can come back in if you're reversed on appeal on the order as to the pension plan. It's a pretty si - it's really not aggressive, an aggressive type of relief we're requesting for. We're just asking that this case go forward in an orderly fashion.
>
> The Court: Why don't we go ahead and just hear [the claim] Thursday.
>
> Mr. Smith [Lowenschuss's counsel]: Let's do that. That's --
>
> The Court: Fine.
>
> Mr. Goodenow: Your Honor, that does not make any

> sense for Resorts to pursue it in that manner.
>
> The Court: Well, --
>
> Mr. Goodenow: First of all, the order - the action's pending --
>
> The Court: - you're the one that filed the claim.
>
> Mr. Goodenow: That's correct. But it was filed before the objection to - Resorts' objection to the plan in this case was heard. And before the Court ruled with respect to the pension plan, that the pension plan was exempt, you remember that there was significant . . . .
>
> The Court: I'm either going to hear it Thursday or I'm going to get rid of it forever. Now which one, which do you want?

In re Lowenschuss, Reporter's Transcript of Hearing, No. BK-R 92-31474-JHT at 23-24 (Bankr. D. Nev. Oct. 12, 1993). When asked what the outcome would be if the Pension Plan were later deemed part of Lowenschuss's bankruptcy estate, the bankruptcy judge replied, "That's just tough. That's tough." Id. at 27.

[4] Furthermore, there is no evidence that Lowenschuss would be prejudiced legally by a dismissal of Resorts's proofs of claim without prejudice. At most, Lowenschuss has been inconvenienced by expending time and resources in preparing for the trial and we have held that "[t]he inconvenience of defending another lawsuit or the fact that the defendant has already begun trial preparations does not constitute prejudice." *Hyde & Drath*, 24 F.3d at 1169. We also note that the inconvenience Lowenschuss has suffered is lessened by the fact that Lowenschuss's trial preparation will likely be relevant to de-

fending the New Jersey action.[5]

[5] In light of the foregoing, we conclude that the Nevada Bankruptcy Court committed a clear error of judgment in denying Resorts's request for conditional withdrawal. We therefore affirm the district court's reversal of that denial. *See LeCompte*, 528 F.2d at 605.

B. THE BANKRUPTCY COURT ERRED IN CONFIRMING A REORGANIZATION PLAN WHICH RELEASES CLAIMS AGAINST NON-DEBTORS

The district court vacated the Global Release Provision, holding that the bankruptcy court lacked the power to approve the provision which released claims against non-debtors. Whether a bankruptcy court has the power to release claims against a non-debtor is a question of law which we review de novo. *See Sousa v. Miguel (In re United States Trustee)*, 32 F.3d 1370, 1372 (9th Cir. 1994).

[6] Lowenschuss's Reorganization Plan contained the following provision which broadly released the debtor and connected persons or entities, including the Pension Plan, from all claims:

> Global releases will be given to Debtor, Debtor's children . . . Fred Lowenschuss Associates, a professional corporation, Fred Lowenschuss Associates

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5. Lowenschuss maintains that it would be unfair to allow Resorts to withdraw its claim days before the scheduled trial after he had expended a large sum of money and time in preparation. A possible remedy for this, however, is not for the district court to dismiss Resorts's claim with prejudice but for it to permit withdrawal without prejudice and to award attorney's fees if appropriate. *See Kern v. TXO Production Corp.*, 738 F.2d 968, 972 (8th Cir. 1984) ("The rule has long prevailed in both law and equity that a plaintiff may dismiss the case without prejudice only by payment of the costs . . . ." (quoting *Home Owners' Loan Corp. v. Huffman*, 134 F.2d 314, 317 (8th Cir. 1943)).

> Pension Plan, as well as releasing of all liens against all trusts, custodian accounts, pension plan, Fred Lowenschuss Associates and satisfying of all outstanding judgments, executions, and levies against the aforementioned or any person or entity connected with them.

Plan of Reorganization ¶ 5D. The Order confirming the Plan elaborated:

> Entry of this Order shall constitute a release of all liens, levies, freezes, attachments and garnishments against Debtor, individually or as trustee, held or claimed to be held by Beverly Selnick, Resorts International, Inc., or anyone else, or issued by this Court or by any other court, and collections sought by Beverly Selnick by reason of any judgment, or for any other reason, against the Debtor, the Fred Lowenschuss Associates Pension Plan, Fred Lowenschuss Associates, a professional corporation, the Debtor's children . . . , as well as all trusts and custodian accounts managed by Debtor.

Confirmation Order ¶ 4.

Primarily relying on other circuits' precedent, Lowenschuss argues that the Global Release Provision was appropriate. We disagree.

[7] The bankruptcy court lacks the power to confirm plans of reorganization which do not comply with applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). Pursuant to 11 U.S.C. § 524(a), a discharge under Chapter 11 releases the debtor from personal liability for any debts. Section 524 does not, however, provide for the release of *third parties* from liability; to the contrary, § 524(e) specifically states that "discharge of a debt of the debtor does not affect the liability of

any other entity on, or the property of any other entity for, such debt." 1 11 U.S.C. § 524(e).

[8] This court has repeatedly held, without exception, that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors. *American Hardwoods, Inc.* v. *Deutsche Credit Corp. (In* re *American Hardwoods Inc.),* 885 F.2d 621, 626 (9th Cir. 1989); *Underhill v. Royal,* 769 F.2d 1426, 1432 (9th Cir. 1985); *Commercial Wholesalers, Inc. v. Investors Commercial Corp.,* 172 F.2d 800, 801 (9th Cir. 1949); *see also Sun Valley Newspapers, Inc. v. Sun World Corp. (In re Sun Valley Newspapers, Inc.),* 171 B.R. 71, 77 (Bankr. 9th Cir. 1994) (holding reorganization plans which proposed to release non-debtor guarantors violated § 524(e) and were therefore unconfirmable); *Seaport Automotive Warehouse, Inc. v. Rohnert Park Auto Parts, Inc. (In re Rohnert Park Auto Parts, Inc.),* 113 B.R. 610, 614-17 (Bankr. 9th Cir. 1990) (finding that a reorganization plan provision which enjoined creditors from proceeding against co-debtors violated § 524(e)); *In re Keller,* 157 B.R. 680, 686-87 (Bankr. E.D. Wash. 1993) (refusing to confirm a reorganization plan that compelled a creditor to release liens against a non-debtor's property).

In *American Hardwoods,* 885 F.2d at 625-26, we explicitly rejected the argument - advanced by Lowenschuss today that the general equitable powers bestowed upon the bankruptcy court by 11 U.S.C. § 105(a) permit the bankruptcy court to discharge the liabilities of non-debtors. Noting that "section 105 does not authorize relief inconsistent with more specific law," we concluded "the specific provisions of section 524 displace the court's equitable powers under section 105 to order the permanent relief [against a non-debtor] sought by [the debtor]." Id. at 625-26.

In essence, Lowenschuss argues that in *American Hardwoods* we recognized an exception to § 524(e)'s prohibition on discharging the liabilities of non-debtors and urges us to find that the exception applies here. Lowenschuss looks to our

discussion, in *dictum in American Hardwoods*, 885 F.2d at 626-27, of the Fourth Circuit's decision in *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989), as indicating our approval of the Fourth Circuit's approach. Lowenschuss ignores the clear language of *American Hardwoods*, where we expressly declined to adopt the approach set forth in *In re A.H. Robins*; we stated, in *dictum*, "[e]ven if we adopted *In re A.H. Robins Co.*. . . , it would not dictate a different result." *American Hardwoods*, 885 F.2d at 626.[6]

[9] Accordingly, because the Global Release Provision is contrary to § 524(e) of the Bankruptcy Code, we affirm the district court's decision vacating the Global Release Provision.

C. THE BANKRUPTCY COURT'S JURISDICTION OVER RESORTS'S CLAIM AGAINST THE PENSION PLAN

[10] Finally, Lowenschuss has waived consideration of the issue of whether the bankruptcy court improperly retained jurisdiction over future litigation of Resorts's claim against the Pension Plan because Lowenschuss failed to argue the issue in

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6. A recent amendment to the Bankruptcy Code buttresses our conclusion that § 524(e) does not permit bankruptcy courts to release claims against non-debtors. The Bankruptcy Reform Act of 1994 added § 524(g) to the Code. That section provides that in asbestos cases, if a series of limited conditions are met, an injunction issued in connection with a reorganization plan may preclude litigation against third parties. The numerous requirements of § 524(g) make it clear that this subsection constitutes a narrow rule specifically designed to apply in asbestos cases only, where there is a trust mechanism and the debtor can prove, among other things, that it is likely to be subject to future asbestos claims. *See* 11 U.S.C. § 524(g)(2)(B).

That Congress provided explicit authority to bankruptcy courts to issue injunctions in favor of the third parties in an extremely limited class of cases reinforces the conclusion that § 524(e) denies such authority in other, non-asbestos, cases.

either his opening or his reply brief. An issue not discussed in a brief, although mentioned in the Statement of Issues, is deemed to be waived. *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986) ("The Court of Appeals will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief.") (citation omitted); *see also Simpson v. Union Oil Co.*, 411 F.2d 897, 900 n.2 (9th Cir.) (issues referred to in appellant's Statement of the Case and Specifications of Error but not discussed in the briefs deemed to be abandoned), *rev'd on other grounds by* 396 U.S. 13 (1969).

III.

Therefore, we **AFFIRM** the district court's ruling reversing the bankruptcy court's refusal to allow Resorts to withdraw its claims without prejudice, and we **AFFIRM** the district court's decision to vacate the Global Release Provision.

AFFIRMED.

FERNANDEZ, J., concurring and dissenting:

I concur with all but part II.A of the majority opinion, but dissent as to that part.

First of all, it is important to say what this case is not. This is not a case where a party sought to obtain a dismissal without prejudice and was then either denied that outright or subjected to intolerable terms and conditions. Far from it. Resorts asked that the case be dismissed with prejudice but asked for special terms and conditions that would bind the bankruptcy court to allowing Resorts to come back into this very case at some future time. It also wanted a condition that would permit it to remain a party-in-interest even though its claim had been dismissed at its own behest. It wanted to retain all of the rights of

a party to the case while avoiding the necessity of a trial. In other words, Resorts claims that it should be allowed to tell the bankruptcy court if and when that court is permitted to adjudicate the basic issue in the Lowenschuss reorganization: did Mr. Lowenschuss himself commit fraud upon Resorts either for his own benefit or for someone else's? The bankruptcy court said that the time had come to try that issue, but Resorts disagreed. Resorts wanted to decide when and where it would pursue its assertion that Lowenschuss committed a wrong, but it never for one moment eschewed the pursuit. It wanted to control the bankruptcy court's calendar.

Of course, the bankruptcy court did not require Resorts to withdraw its claim with prejudice after Resorts had merely made a voluntary withdrawal motion. That court, at all times, afforded Resorts the right to go forward with its claim, even though Resorts thought that might turn out to be a useless act.[1] If Resorts thought that withdrawal of its claim without the special conditions it demanded would be too burdensome, it could have proceeded with the case on the merits. *See Lau v. Glendora Unified School Dist.*, 792 F.2d 929, 930-31 (9th Cir. 1986) (per curiam order); *see also Gravatt v. Columbia Univ.*, 845 F.2d 54, 56 (2nd Cir. 1988).

Again, Resorts did not simply want to obtain a voluntary dismissal, which was denied to it. *Cf. Hyde & Drath v. Baker*, 24 F.3d 1162, 1169 (9th Cir. 1994). It wanted a voluntary dismissal with prejudice and with a guarantee that it could stay in the fray at the same time. In my view, it was not entitled to that and still is not. It, like others who dismiss their actions, simply

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1.I am dubious about Resorts's premise. By any account, Lowenschuss, the alleged wrongdoer, was the trustee, administrator, and sole beneficiary of the Pension Plan. Could it be that the Plan would not be bound by an adjudication that he had committed fraud when he engaged in the redemption transaction on its behalf? I doubt it.

had to abide the vicissitudes of the future. Perhaps it would want to return, perhaps not. Perhaps it would be able to return, perhaps not. It was not entitled to an advance declaration that would allow it to continue participating in the bankruptcy proceedings and that would require the bankruptcy court to conduct all further proceedings with an eye on the possibility that Resorts would later demand a trial of the issue in question.

In fine, Resorts might have been permitted to leave this case and to hope that it could find a procedural way back in, if it found that necessary. Resorts was not permitted to dictate how the bankruptcy court was to handle the case, its calendar, and any possible later request by Resorts to return to the case.

Therefore, I respectfully dissent as to Part II.A.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In Re: FRED LOWENSCHUSS, Debtor.	No. 94-16287 D.C. No. CV-93-000738-HDM District of Nevada
RESORTS INTERNATIONAL, INC. Appellee, v. FRED LOWENSCHUSS, Appellant.	**ORDER**

Before: CHOY, CANBY, FERNANDEZ, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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Attorneys for Debtor

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA

* * *

IN RE:

FRED LOWENSCHUSS,

Debtor.
_____/

Case No. BK-N-92-31474-JHT
(Chapter 11)

PLAN OF REORGANIZATION

1. INTRODUCTION

Debtor filed his petition for relief under Chapter 11 of the Bankruptcy Code an August 24, 1992. This Plan of Reorganization is the Debtor's proposal to his creditors to resolve the debts he owed on the date of filing the petition.

The Plan must receive creditor approval and the Court must find that it meets the requirements of the law in order to be confirmed. If this Plan is not confirmed, then the Court may allow:

(a) the case to be dismissed;
(b) the Debtor to draft another plan; or
(c) the case to be converted to a Chapter 7 proceeding,

with the assets of the Debtor being sold in liquidation and the proceeds distributed in accordance with the Bankruptcy Code. Creditors are reminded that the Debtor has prepared and filed a Disclosure Statement that provides information about the Debtor and his past operations.

2. DEFINITIONS

The following terms, when used in this Plan of Reorganization, shall be defined as follows:

1. "Allowed Claim". This term will refer to and mean every claim: (a) as to which a proof of claim has been filed with the Court within the time fixed by the Court or, if such claim arises from the Debtor's rejection of an unexpired lease or other executory contract, within thirty (30) days after the Effective Date of the Plan, or (b) which is scheduled as of the Confirmation Date of the Plan in the schedules filed by the Debtor or amended by the Debtor as of said date (summarized in Exhibit "B" to the Disclosure Statement), and is liquidated in amount and undisputed; and in either of the above events as to which no objection to allowance of such claim or request for subordination thereof has been filed within any applicable time period fixed by the Court or as to which an order, allowing such claim and establishing its priority has become final and non-appealable.

2. "Bankruptcy Code". Bankruptcy Code means the Bankruptcy Code of 1978, as codified in Title 11 of the United States Bankruptcy Code by Public Law 95-598, including all amendments thereof and thereto.

3. "Bankruptcy Court". Bankruptcy Court means the United States Bankruptcy Court for the District of Nevada, Reno, or such other court as has jurisdiction of this Chapter 11 case.

4. "Claim". Claim means any right to payment, whether or not such right is reduced to judgment, liquidated, unliquidat-

ed, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or any right to an equitable remedy for breach of performance, if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

5. "Confirmation Date". This term will refer to and mean the date on which the Court enters its Order confirming Debtor's Plan of Reorganization, or any amended plan of reorganization.

6. "Debtor". The term Debtor means FRED LOWENSCHUSS, the Debtor in the above-captioned Chapter 11 case.

7. "Disclosure Statement". Disclosure Statement means the Disclosure Statement filed by the Debtor, as amended from time to time. Debtor has filed his Disclosure Statement, however, it may be subsequently amended, and creditors may actually receive a first or second amended disclosure statement.

8. "Effective Date". This term will refer to and mean the first business day occurring at least thirty (30) days following the Confirmation Date, in the event the confirmation is not appealed. In the event confirmation of Debtor's Plan is appealed, then Debtor shall have the right, but not the obligation, to treat the above date as the Effective Date, notwithstanding the pendency of any such appeal, under circumstances that would moot any such appeal. Except for earlier performance by the Debtor expressly required in any provision of this Plan, the Debtor's performance under the Plan shall be due on the Effective Date of the Plan; however, the Debtor shall have the right, but not the obligation, to perform any of his obligations under the Plan on a date earlier than the Effective Date if the Debtor deems it appropriate to do so.

9. "Plan". This term shall refer to Debtor's Plan of Reorganization, together with any amendments or modifications thereto as may hereafter be filed by the Debtor.

10. "Reorganized Debtor". This term means FRED LOWENSCHUSS after the Confirmation Date.

3. CLAIMS AND INTERESTS

A. CLASSIFICATION OF CLAIMS AND INTERESTS

All claims and interests against the Debtor shall be designated as follows:

Class 1: Costs and expenses of administration as defined in the Bankruptcy Code for which application for allowance or a claim is filed prior to the Confirmation Date as allowed and approved by the Court.

Class 2: The allowed claim of Daniel P. Fuss, Inc., secured by material and labor.

Class 3: The allowed claim of unsecured creditors, except for the claim of Beverly Selnick.

Class 4: The allowed claim of Beverly Selnick.

Class 5: The allowed claim of civil penalty to the Prothonotary of Montgomery County, Pennsylvania.

B. TREATMENT OF CLAIMS AND INTERESTS

Class 1: Class 1 claimants shall be paid in full on confirmation of Debtor's plan.

Class 2: The Class 2 claimant shall receive payment in full of its claim without interest, within 90 days following the Confirmation Date.

Class 3: Allowed Class 3 claims shall not bear interest and shall receive prorata monthly disbursements of .3% of the allowed claim, not to exceed a total monthly disbursement of $1,500.00, for a period of 60 months. Such payments shall commence on the Effective Date, and continue on a like day of

each and every month thereafter for a total of 60 payments.

Class 4: The Class 4 creditor shall receive 38.7% of Debtor's pension plan, payable as follows: (1) sums already collected by the Class 4 creditor in the approximate amount of $500,000.00, (2) delivery of $800,000.00 of net face amount of bonds from Resorts International currently held by the pension plan, and (3) $10,000.00 per month for 180 months to be paid directly from the pension plan. All liens, attachments and garnishments of the Class 4 creditor against Debtor, Fred Lowenschuss Associates, or the pension plan of Fred Lowenschuss Associates, or any of the accounts of the Debtor's children, including trust accounts, individual accounts, real estate accounts, or personal accounts, shall be released upon plan confirmation. Any and all tax liability associated with payments to the Class 4 creditor hereunder shall be paid by the Class 4 creditor, and the Class 4 creditor shall hold Debtor and the pension plan harmless from such liability. The Class 4 creditor shall comply with all IRS regulations including any withholding of taxes. Payment as set forth herein shall be payment in full to the Class 4 creditor, and all further collection efforts of the Class 4 creditor shall terminate, specifically including any attempt to assert ownership or execute against certain real property known as 1425 Colton Road, Glad-wyne Pennsylvania, and any collection efforts concerning an annuity of Wausau insurance, and all liens and attachments by reason of any collection efforts are released. Any unsecured claim of the Class 4 creditor shall be subordinated to the claims of Class 3 creditors, and the Class 4 creditor shall receive no disbursement on account of her general unsecured claim.

Class 5: Class 5 claims shall be subordinated to Class 1, 2, 3 and 4 claims, and shall receive no disbursement under this Plan. All outstanding orders of the court, including all orders for civil contempt, shall be vacated upon plan confirmation.

4. MEANS FOR EXECUTING THE PLAN

The Plan shall be funded by income which the Debtor derives from consulting and practicing law, recovery from outstanding lawsuits, as well as income received by Debtor from the pension plan. The Class 4 creditor is to be paid directly from the pension plan as outlined above.

5. MISCELLANEOUS PROVISIONS

A. Upon confirmation of the Plan, all property of the estate shall be revested in the Debtor, and the Debtor shall retain such property as the Reorganized Debtor, free and clear of all claims and interests of the creditors.

B. The Reorganized Debtor will serve as disbursing agent and shall disburse all property to be distributed under the Plan. The disbursing agent may employ or contract with other entities to assist in or to perform the distribution of the property and shall serve without bond.

C. Any property to be distributed under the Plan becomes property of the Reorganized Debtor if it is not claimed by the entity entitled to it before the latter of one year after confirmation of the Plan or sixty (60) days after an order allowing the claim of the entity becomes a final order.

D. Global releases will be given to Debtor, Debtor's children, Laurance, David, Alan and Edward Lowenschuss, Fred Lowenschuss Associates, a professional corporation, Fred Lowenschuss Associates Pension Plan, as well as releasing of all liens against all trusts, custodian accounts, pension plan, Fred Lowenschuss Associates and satisfying of all outstanding judgments, executions, and levies against the aforementioned or any person or entity connected with them.

6. RETENTION OF JURISDICTION

The Bankruptcy Court shall retain jurisdiction for the following specific purposes:

A. For the purpose specified in § 1142 of the Bankruptcy Code;

B. The consideration of claims and such objections as may be filed to the claims of creditors pursuant to § 502 of the Bankruptcy Code;

C. The fixing of compensation for the parties entitled thereto. Applications for compensation shall be filed within sixty (60) days following the Confirmation Date;

D. To hear and determine the amount of all encumbrances or to reconvey any preferences, transfers, assets or damages to whi-ch the Debtor's estate may be entitled under applicable provisions of the Bankruptcy Code or other federal, state, or local law;

E. To reinstate the automatic stay pending a determination of the amount owed in any secured claim;

F. To hear and decide any causes of action now held by the Debtor and determine all questions and disputes regarding title to the assets of the estate;

G. To resolve any disputes regarding interpretation of the Plan;

H. To implement the provisions of the Plan, and to make such further orders as will aid in consummation of the Plan, including the sale of any property after Plan confirmation;

I. To adjudicate controversies regarding property of the Debtor's estate and regarding ownership thereof, including adjudication of causes of action which constitute property of the estate;

J. To modify this Plan in accordance with § 1127 of the Bankruptcy Code; and

K. Render an order closing the case.

7. REQUEST FOR APPLICATION OF 11 U.S.C. §1129(b)

The Debtor, as proponent of this Plan of Reorganization, requests the Court to find that the provisions for dissenting classes provide for fair and equitable treatment of said creditors, and to confirm this Plan notwithstanding the requirements of § 1129(a)(8) as to such classes.

DATED this 5 day of March, 1993.

SMITH & COPE

By */s/ Alan R. Smith*
Attorneys for Debtor

/s/ Fred Lowenschuss
FRED LOWENSCHUSS

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * *

IN RE:	Case No. BK-N-92-31474-JHT (Chapter 11)
FRED LOWENSCHUSS,	**ORDER CONFIRMING DEBTOR'S PLAN OF REORGANIZATION**
Debtor.	Hearing Date: October 27, 1993
_____/	Hearing Time: 2:00 p.m.

A Plan of Reorganization (the "Plan") under Chapter 11 ofthe Bankruptcy Code having been filed by Debtor, Fred Lowenschuss, and a copy of said Plan together with Debtor's First Amended Disclosure Statement (the "Disclosure Statement") having been mailed to holders of all claims and interests, objections having been filed by Beverly Selnick, through her counsel, Gordon & Silver, Ltd., and Monteverde & Hemphill, the United States Trustee, through Larry J. Gallagher, Esq., Assistant United States Trustee, and Resorts International, Inc., through its counsel, Gibson, Dunn & Crutcher, and Vargas & Bartlett, and the Court having arguments of counsel and the evidence

presented, that:

1. The Plan complies with the applicable provisions of Chapter 11 of the Bankruptcy Code.

2. The proponent of the Plan complies with the applicable provisions of the Bankruptcy Code.

3. The Plan has been proposed in good faith and not by any means forbidden by law.

4. A. That any payment made or promised by the Debtor, or by any person acquiring property under the Plan, in connection with the case, or in connection with the Plan and incident to the case, have been disclosed to the Court; and

B. Any such payment made before confirmation is reasonable; or if such payment is to be fixed after confirmation of the Plan, such payment is subject to the approval of the Court as reasonable.

5. With respect to each class under the Plan, each holder of a claim or interest of such class has accepted the Plan; or will receive or retain under the Plan on account of such claim or interest property of a value, as of the Effective Date of the Plan, that is not less than the amount that such holder would so receive or retain if the Debtor was liquidated under Chapter 7.

6. Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the Plan provides that with respect to a claim of the kind specified in Section 507(a)(1) or 507(a)(2) of the Bankruptcy Code, on the Effective Date of the Plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim.

7. At least one impaired class of claims has accepted the Plan, determined without including any acceptance of the Plan by an insider holder of a claim of such class.

8. Confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtor or any successor to the Debtor under the

Plan, unless such liquidation or reorganization is proposed in the Plan.

9. That Class 2 and 3 creditors have accepted the Plan by affirmative vote.

The Court having made the findings set forth above, it is hereby ORDERED AS FOLLOWS:

1. Subject to the modifications set forth below, the Plan of Reorganization filed by the Debtor on March 8, 1993, is confirmed.

2. Bonds of Resorts International, Inc., having a face value of $100,000.00, shall be endorsed sufficient for transfer of ownership, and shall be delivered to and held by Alan R. Smith, Esq., to be used for payment of the allowed fees of Stephen R. Harris, Esq., and James Proctor in the amount of $11,500.00 upon final resolution of the outstanding appeal. Following resolution of the appeal, such amount of said bonds as are necessary to satisfy payment of said fees shall be delivered to Stephen R. Harris, Esq. Debtor shall have the right to substitute the sum of $11,500.00 cash at any time, which shall be held in a segregated account of Alan R. Smith, Esq., subject to the conditions set forth above. Alan R. Smith, Esq., has been paid the sum of $60,000.00 on October 28, 1993, by the Pension Plan. The balance of the fees to Alan R. Smith, Esq., shall be paid prior to December 31, 1993, in the amount of $30,856.26. The Pension Plan is authorized to pay said fees.

3. Pursuant to the Plan, and subject to the conditions of this paragraph, the Class 4 creditor, Beverly Selnick, shall be entitled to collect the income due from the Wausau Insurance Annuity, a copy of which is attached hereto as Exhibit "A". Debtor's monthly obligation under the Plan shall be reduced by any payment due from the Wausau Insurance Annuity. Upon Debt-or's completion of the payments under the Plan, which is projected to be October 1, 2008, the balance of the Wausau Insurance Annuity shall revert to the Debtor.

4. Entry of this Order shall constitute a release of all

liens, levies, freezes, attachments and garnishments against Debtor, individually or as trustee, held or claimed to be held by Beverly Selnick, Resorts International, Inc., or anyone else, or issued by this Court or by any other court, and collections sought by Beverly Selnick by reason of any judgment, or for any other reason, against the Debtor, the Fred Lowenschuss Associates Pension Plan, Fred Lowenschuss Associates, a professional corporation, the Debtor's children, Laurance, David, Alan and Edward Lowenschuss, as well as all trusts and custodian accounts managed by Debtor.

5. The terms and conditions of the Plan, including the global releases set forth in section 5D, are specifically approved, ratified and incorporated into this Order, and a copy of the Plan is attached hereto as Exhibit "B" and incorporated herein by reference.

6. In addition to the jurisdiction retained as set forth in section 6 of the Plan, jurisdiction is specifically retained by this Court for the following:

A. To consider Debtor's adversary case filed against Resorts International, Inc., Adversary Proceeding No. 93-03110, and all claims of Resorts International, Inc., against Debtor individually and/or as trustee of Fred Lowenschuss Associates Pension Plan and Debtor's interest in the Fred Lowenschuss Associates Pension Plan;

B. To consider Adversary Proceeding No. 93-03065, David Lowenschuss v. Fred Lowenschuss, which includes Debtor's Third Party Complaint.

7. As provided in the Plan, property of the bankruptcy estate revests in the Debtor upon confirmation of the Plan, free and clear of all liens and encumbrances except as set forth in the Plan. All freeze orders previously issued by this Court or any other court with respect to securities, bank accounts and safety deposit boxes are vacated.

8. The Bankruptcy Court shall retain jurisdiction for the

following specific purposes:

A. The consideration of claims and such objections as may be filed heretofore or hereafter to the claims of creditors pursuant to § 502 of the Bankruptcy Code, including any and all Resorts International, Inc., claims;

B. To hear and decide any causes of action now held by the Debtor, including recovery of accounts receivable, and to determine all questions and disputes regarding title to the assets of the estate; and

C. To adjudicate controversies regarding property of the Debtor's estate and regarding ownership thereof, including adjudication of causes of action which constitute property of the estate.

D. To implement the provisions of the Plan.

9. Distributions under this Plan shall be made despite the existence of an appeal unless an order staying performance under the Plan is entered by a court of appropriate jurisdiction.

10. Debtor shall pay the Office of the U.S. Trustee any quarterly fees currently due within ten (10) days of the effective date of the Plan.

11. The Debtor shall file with the Clerk, not later than twelve (12) months after the entry of this Order, and every twelve (12) months thereafter until all disbursements to the creditors hereunder are completed, a report of the action taken by the reorganized Debtor and the progress made toward consummation of the confirmed Plan. Said report shall include, as a minimum, the following information:

A. A schedule of any real property, and cost, acquired since confirmation of the Plan, and a schedule of each item of personal property acquired at a cost of more than $ N/A since confirmation of the Plan.

B. A schedule of each debt and each class, listing the total amount the Plan required to be paid, the amount required to be paid to date, the amount actually paid to date, and the

amount unpaid.

C. A schedule of executory contracts entered into or assumed after plan confirmation.

D. A statement indicating that Debtor's personal postpetition taxes of every kind have been paid current, identifying each type of tax which has been paid and is current (i.e., income, payroll, property, sales, etc.), *or* a detailed explanation of any and all delinquencies, by type of tax, and dollar amount.

E. An estimate of the time for Plan consummation and application for final decree.

F. Any other pertinent information needed to explain the progress toward completion of the confirmed Plan.

The Debtor shall file further progress reports not later than twelve (12) months after the initial progress report is due and every twelve (12) months thereafter, until the estate is fully administered as provided in Rule 3022 of the Federal Rules of Bankruptcy Procedure. A copy of the initial and subsequent progress reports shall be filed concurrently with the Office of the United States Trustee.

Failure to file timely the initial and subsequent progress reports shall be grounds for noticing the case for conversion to a case under Chapter 7 or dismissal under 11 U.S.C. § 1112(b).

DATED this 28 day of October, 1993.

/s/ James H. Thompson
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

IN RE:	BK-N-92-31474-JHT (Chapter 11)
FRED LOWENSCHUSS,	
Debtor.	
RESORTS INTERNATIONAL, INC.	CV-N-93-738-HDM (BASE FILE)
Appellant,	
vs.	**DECISION**
FRED LOWENSCHUSS,	
Appellee.	

Resorts International appeals the bankruptcy court's orders of October 12, 14, and 28, 1993 on the grounds that the bankruptcy court improperly discharged claims against the Fred Lowenschuss Associates Pension Plan (the "Pension Plan") as part of the confirmation of debtor Fred Lowenschuss's Chapter 11 reorganization plan, that it improperly retained jurisdiction over Resorts's claims against the Pension Plan, and that it improperly refused to allow Resorts to condition the voluntary withdrawal of its proofs of claim.

Resorts's first contention on appeal is that the bankruptcy court erred in confirming a reorganization plan that granted discharges in favor of the Pension Plan, a nondebtor. As a general rule, a bankruptcy court has no power to relieve parties

other than the bankrupt from their debts or obligations. *Commercial Wholesalers, Inc. v. Investors Commercial Corp.*, 172 F.2d 800 (9th Cir. 1949) ; *Allen v. Kaplan*, 258 A.2d 211 (Md. 1969). Section 524(e) of the Bankruptcy Code states:

> Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

Although section 105 of the Bankruptcy Code empowers bankruptcy courts to enjoin creditors from continuing actions or enforcing state court judgments against nondebtors prior to confirmation of a plan, and permits the court to issue both preliminary and permanent injunctions after the confirmation of a plan to protect the debtor and the administration of the bankruptcy estate, section 105 does not authorize relief inconsistent with more specific law. *In re American Hardwoods, Inc.*, 885 F.2d 621, 625 (9th Cir. 1989). Section 524(e) of the Bankruptcy Code, explains the Ninth Circuit in *American Hardwoods*, "limits the court's equitable power under section 105 to order the discharge of the liabilities of nondebtors . . . . *Id.* at 626.

The cases cited by Lowenschuss are distinguishable on their facts from the present case. *In re AOV Industries*, 792 F.2d 1140 (D.C. Cir. 1986), in which a plan's release provisions were held not to constitute an impermissible discharge of non-petitioning third parties contrary to Bankruptcy Code § 524(e), involved two creditors of the debtor who agreed to make $3 million available to the unsecured creditors if the unsecured creditors released all of their pending claims against the two creditors. In *In re Resorts International, Inc.*, 145 B.R. 412 (Bankr. D.N.J. 1990), the releases in question were held to be voluntary and "purely contractual between the parties and the release." *Id.* at 468.

Resorts did not, voluntarily or otherwise, enter into any

contractual agreements with Lowenschuss or anyone else whereby the Pension Plan would be discharged of any debt it might owe Resorts. There is no evidence in the record that the Pension Plan is funding the Chapter 11 Plan; rather, Lowenschuss's income from the Pension Plan is paid directly into the Chapter 11 Plan. Absent the voluntary consent of Resorts, the discharge of non-petitioning third parties, such as the Pension Plan, is contrary to section 524(e) of the Bankruptcy Code. The bankruptcy court's discharge of claims against the Pension Plan was erroneous.

Resorts next contends that the bankruptcy court wrongfully "expanded" its jurisdiction to include any future claims by Resorts against the Pension Plan. As a general matter, a bankruptcy court should not assume jurisdiction over a matter that does not involve the administration or property of a bankruptcy estate. *In re Ennis*, 50 B.R. 119 (Bankr. D. Nev. 1985). In order for a bankruptcy judge to exercise jurisdiction over a proceeding involving a non-creditor third party, there must be a substantial relationship between the matter in controversy and the bankruptcy case. *Id.*

The bankruptcy court held that the Pension Plan is not part of Lowenschuss's bankruptcy estate. Because the Pension Plan is not an asset of Lowenschuss's bankruptcy estate, under *In re Ennis* the bankruptcy court lacks jurisdiction over Resorts's claims against the Pension Plan. Resorts is a single claimant asserting a single claim against the Pension Plan which is a non-contributor to the Lowenschuss's Chapter 11 Plan. The Pension Plan can have no claim over against the estate. Therefore, vacating the provision releasing the Pension Plan would not affect any of the other elements of Lowenschuss's Chapter 11 Plan. That portion of the confirmation order in which the bankruptcy court asserts jurisdiction over Resorts's claims against the Pension Plan is, therefore, vacated.

Finally, Resorts appeals the bankruptcy court's refusal to allow a conditional withdrawal of its proofs of claim on the

ground that if the Pension Exemption order is reversed on appeal, Resorts would be unfairly denied the opportunity to reassert its claim against Fred Lowenschuss. Federal Rule of Bankruptcy Procedure 3006 grants bankruptcy courts considerable discretion to impose conditions on a creditor's withdrawal of claims. The bankruptcy court's exercise of that discretion is subject to review for abuse of discretion. *In re Lawler*, 106 B.R. 943, 951 (N.D. Tex. 1989). Under *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, __ U.S. ___, 113 S. Ct. 1489, 1495 (1993), the bankruptcy court must balance the interests of all affected parties to ensure the success of the reorganization.

Resorts contends that its claim against Lowenschuss was premised on the belief that the Pension Plan would be part of Lowenschuss's bankruptcy estate. When the bankruptcy court ruled in July of 1993 that neither the Pension Plan nor Fred Lowenschuss's beneficial interest in the Pension Plan was property of the Lowenschuss bankruptcy estate, Resorts felt, it claims, that it was appropriate to withdraw its claim against the Lowenschuss estate. Resorts moved on September 30, 1993 to withdraw its proofs of claim and requested that the bankruptcy court issue an order that preserved Resorts's right to reinstate its claims if the Pension Exemption order is reversed on appeal.[1] The bankruptcy court denied the conditional withdrawal and gave Resorts the option of withdrawing its proofs of claim with prejudice and without conditions or proceeding immediately to trial. Resorts opted for the former.

The bankruptcy court gave insufficient consideration to Resorts's interests. If the bankruptcy court's ruling excluding the Pension Plan from Lowenschuss's bankruptcy estate is reversed on appeal and the Pension Plan becomes part of that estate, Resorts will be unable to assert a claim as creditor

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1. Lowenschuss's ex-wife, Beverly Selnick, is currently appealing the Pension Exemption order.

against the Pension Plan due to its compelled unconditional withdrawal of its proofs of claim. The bankruptcy court, therefore, abused its discretion when it refused to allow Resorts to make its withdrawal conditional upon affirmation on appeal of the Pension Exemption order.

REVERSED and REMANDED.

It is so ORDERED.

Dated this 9th day of June, 1994.

/s/ Howard McKibben

UNITED STATES DISTRICT JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA

IN RE:	BK-N-92-31474 (Chapter 11)
FRED LOWENSCHUSS, Debtor. _____/	
FRED LOWENSCHUSS, Plaintiff, vs.	ADV. 94-3061 **FINAL INJUNCTION**
RESORTS INTERNATIONAL, INC., MITCHELL A. KARLIN, ESQ. AND GIBSON, DUNN & CRUTCHER, Defendants _____/	DATE: September 6, 1994 TIME: 9:00

On August 11, 1994, Plaintiff, Fred Lowenschuss, filed this Adversary Complaint for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction. An Ex Parte Temporary Restraining Order was entered on August 11, 1994. Defendants' Motion to Dissolve Temporary Restraining Order was heard on August 16, 1994 and the motion was denied by Order dated August 22, 1994. Pursuant to F.R.C.P. 65(a)(2), the trial of the action on the merits was advanced and consolidated with the hearing on the preliminary injunction which was heard an August 22, 1994. On August 30, 1994 this Court entered an Order entitled "Restraining Order and Injunction

After Hearing". On September 6, 1994 a hearing was held to clarify the August 30, 1994 Order. After consideration of the pleadings and arguments of counsel, therefore;

IT is HEREBY ORDERED that the above-named defendants are permanently enjoined from proceeding against the Debtor, Fred Lowenschuss, individually and as Trustee of the Fred Lowenschuss IRA, in the adversary proceeding entitled Resorts International, Inc. v. Fred Lowenschuss, et al. originally instituted in the United States District court for the Eastern District of Pennsylvania, Civil Action No. 89-6917, and thence removed to and now pending in the United States Bankruptcy Court for the District of New Jersey, as Adversary Proceeding No. 90-1055 in Case Nos. 89-10119, 89-10120, 89-10461, 89-10462.

IT IS FURTHER ORDERED that the August 30, 1994 order is hereby vacated.

DATED this 6th day of September, 1994.

/s/ James H. Thompson
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

IN RE:	BK-N-92-31474-JHT Chapter 11
FRED LOWENSCHUSS, Debtor.	
FRED LOWENSCHUSS, Appellee,	CV-N-93-738-HDM
vs.	**ORDER**
RESORTS INTERNATIONAL, INC. Appellant.	

The appellee, Fred Lowenschuss, has filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit filing that notice on July 8, 1994. Lowenschuss now moves this court for a stay of its decision pending appeal. This motion is based upon Fed. R. Civ. P. 62 (c). Lowenschuss seeks a stay of the decision of this court, specifically, that portion of the decision that vacates the release of the pension plan. Lowenschuss contends that the actions of Resorts threaten irreparable injury to Lowenschuss and that Lowenschuss has a reasonable likelihood of success on the merits.

In order to obtain a stay pending appeal, the court must consider four factors: (1) the likelihood of success on appeal; (2) the harm occasioned to the appellee by reason of any stay;

(3) any irreparable harm that may be suffered by the appellant; and (4) public policy. *Nevada Airlines, Inc. v. Bond*, 622 F.2d 1017, 1018 (9th Cir. 1980). The moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardship tips sharply in its favor. *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*, 643 F. 2d 1197, 1200 (9th Cir. 1980). Lowenschuss contends that he has demonstrated the possibility of irreparable injury. Although Lowenschuss may have completed all actions required under the plan to date, the pension plan, according to Lowenschuss, continues to have an obligation under the debtor's plan of reorganization to pay Beverly Selnick a substantial sum each month. The debtor relies upon the pension plan to make these payments. If the pension plan is unable to make the payments directly to Selnick, the debtor will then be under default under his plan of reorganization.

Lowenschuss correctly points out that Resorts has sought an injunction to remove the current trustees for the pension plan and to appoint a new trustee for the pension plan and prevent further disbursements from the pension plan. This would, as Lowenschuss points out, constitute an injury since the result would be to convert or dismiss the debtor's Chapter 11 case. Therefore, the court concludes that Lowenschuss has established that he will suffer irreparable injury if the stay pending appeal is not granted.

Lowenschuss has demonstrated serious questions of law going to the relief sought by appellee. The court views Lowenschuss's motion for stay as raising serious questions. While the court believes its previous rulings are correct, Lowenschuss raises serious questions of law.

Finally, the court concludes that Resorts will suffer little hardship by staying this court's decision while Lowenschuss is exposed to significant harm. Therefore, the balance of

hardships tips sharply in favor of Lowenschuss.

Therefore, it is ORDERED that appellee's motion for stay is granted.

Dated this 7th day of November, 1994.

/s/ Howard McKibben
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
MAY 10 1996
CLERK

No. 95-1348

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FRED LOWENSCHUSS,

Petitioner,

v.

RESORTS INTERNATIONAL, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly affirmed the ruling of the District Court that the Bankruptcy Court erred by discharging the claims of a creditor against a non-debtor, when no Court of Appeals has ever permitted a bankruptcy court to extinguish claims of a creditor against a non-debtor unless the debtor's plan of reorganization gave the creditor an alternative source of full recovery to which the non-debtor had contributed.

2. Whether the Court of Appeals correctly affirmed the ruling of the District Court that the Bankruptcy Court abused its discretion when it denied a creditor's motion for dismissal with conditions and failed to consider any of the equities presented by the creditor.

3. Whether the Court of Appeals correctly held that a creditor's appeals of a plan of reorganization's confirmation order and a claim withdrawal order were not moot after substantial consummation of the plan, where the debtor was an individual with no business to reorganize and where the value of the bankruptcy estate would be substantially augmented if the debtor failed in his effort to exempt the assets of his multi-million dollar pension plan or his beneficial interest therein from the estate.

PARTIES INVOLVED

Respondent Resorts International, Inc. changed its corporate name to Griffin Gaming & Entertainment, Inc. ("GGE") on June 30, 1995. GGE is the parent company and has no nonwholly owned subsidiaries.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-1348

—

FRED LOWENSCHUSS,

Petitioner,

v.

RESORTS INTERNATIONAL, INC.,

Respondent.

—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

—

PRELIMINARY STATEMENT

Respondent Resorts International, Inc. respectfully requests that this Court deny the petition for certiorari, which provides no basis for review by this Court. This case, which tells the story of an individual debtor's abuse of the bankruptcy process, is in an interlocutory posture. The ruling

below does not raise a novel or timely issue and does not conflict with any other circuit court.

STATEMENT OF THE CASE

Petitioner Fred Lowenschuss is a debtor in an ongoing bankruptcy case in the District of Nevada. The case is still active because the threshold issue has yet to be decided -- whether petitioner's multi-million dollar beneficial interest in his pension plan (the "Plan") is part of his bankruptcy estate.

Two events precipitated the filing of petitioner's voluntary bankruptcy petition. First, Resorts was on the eve of trial in its action against the Plan in a bankruptcy court in New Jersey. Resorts was claiming that petitioner, who was the trustee, administrator, sponsor, and sole beneficiary of the Plan, had defrauded Resorts out of almost $4 million in cash. Upon his bankruptcy filing, petitioner sought and obtained an order staying Resorts' action against the Plan pursuant to Bankruptcy Code section 362. The trial date was thus canceled.

Second, a bench warrant had been issued for petitioner's arrest in Pennsylvania, where he had lived and practiced law for 20 years. The warrant stemmed from his willful failure to transfer millions of dollars in assets to his former wife pursuant to a final judgment in his protracted divorce action. Rather than transfer the assets to his former wife, petitioner transferred them out of Pennsylvania to bank accounts under his control in Florida and California. The assets have never been transferred to petitioner's former wife, and the arrest warrant has never been executed. Petitioner then fled to Nevada to commence his bankruptcy case. Respondent's Appendix at 3a, 9a, 10a.

Believing that the assets of the Plan might constitute property of petitioner's individual bankruptcy estate, Resorts filed proofs of claim based upon its pending action in New Jersey against the Plan.

On July 21, 1993, the Nevada Bankruptcy Court granted petitioner's motion and held that neither the Plan nor petitioner's beneficial interest in it were part of his bankruptcy estate. Petitioner's former wife appealed, and the issue remains unresolved to this day.[1]

Because Resorts' claims were against the Plan, it did not matter to Resorts whether the Plan or petitioner's beneficial interest therein was or was not part of petitioner's bankruptcy estate. (In this regard, Resorts was different from petitioner's other creditors, who would receive almost nothing if the Plan and petitioner's beneficial interest therein were exempted from the estate.)

Following the ruling that excluded the Plan from the estate, Resorts sought to withdraw its proofs of claim so that it could prosecute its claims against the Plan in Resorts' pending action in New Jersey. Resorts asked to do so on the condition that it would have the right to reinstate its claims if the ruling excluding the Plan were reversed on the appeal filed by petitioner's former wife. The Bankruptcy Court denied

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[1] On appeal to the Nevada District Court, that court vacated the Bankruptcy Court's ruling and remanded for further evidentiary hearings. Although those hearings have been held, the Bankruptcy Court has not yet issued a ruling on the question. Respondent's Appendix at 1a-2a, 15a.

Resorts' request to withdraw with this condition and compelled Resorts to withdraw its claims with prejudice.

After Resorts' withdrawal, the petitioner proposed, and the Bankruptcy Court approved, a plan of reorganization that, among other things, granted *the Plan* a release from Resorts' claims against it. Thus, the Bankruptcy Court extinguished Resorts' claims against both the debtor and the Plan so that Resorts could not pursue its claims in any forum. In addition, the confirmation order purported to have the Bankruptcy Court assert jurisdiction over Resorts' claims against the Plan, which were still pending in New Jersey.

The net effect of the Bankruptcy Court's orders was that Resorts would receive nothing from the estate, that Resorts' claims against the Plan were discharged even though the claims had never been tried and even though Resorts had received no compensation from the Plan or elsewhere for those claims, and (redundantly) that, if Resorts moved to sue the Plan, Resorts had to do so in the Nevada Bankruptcy Court.

Resorts appealed three rulings of the Bankruptcy Court to the Nevada District Court; all three rulings were reversed. The District Court ruled that the Bankruptcy Court:

> (a) lacked power to grant a release in favor of a non-debtor, the Plan;
>
> (b) lacked jurisdiction to adjudicate claims of a non-creditor, Resorts, against a non-debtor, the Plan; and
>
> (c) abused its discretion in not permitting Resorts to withdraw its proofs of claim on the

> condition that it would have the right to reinstate them if the Plan ultimately were ruled to be part of the estate.

Petitioner's Appendix at 46a-48a.

Petitioner appealed to the Court of Appeals for the Ninth Circuit, which affirmed on all issues. Id. at 6a, 21a. Thereafter, the trial of Resorts' action against the Plan finally proceeded in the bankruptcy court in New Jersey. The bench trial concluded six months ago; decision has been reserved.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI IN THIS CASE TO ADDRESS THE ISSUE OF A BANKRUPTCY COURT'S AUTHORITY TO RELEASE NON-DEBTORS.

The principal argument presented in the Petition is that "courts have increasingly granted non-debtor releases . . . [under] Section 105(a) of the Bankruptcy Code," Petition at 8, and that the refusal of the Court of Appeals to do so here reflects a clear and sharp split among the Courts of Appeals on this issue. In fact, no such split exists.

First, it is premature for this Court to address the issue of non-debtor releases in this case because the Plan's continued status as a non-debtor is uncertain. If the Bankruptcy Court finds, on remand, that the Plan is part of petitioner's bankruptcy estate, there will no longer be any non-debtor against whom to release any claims. (*See* Section A below.)

Second, no Court of Appeals has ever actually affirmed on the merits a plan of reorganization providing for a discharge or release of claims by a creditor against a non-debtor. In making this argument, the Petition simply misreads the cases. (*See* Section B below.)

Third, Congress amended the Bankruptcy Code in October 1994, months after the confirmation of the plan of reorganization in this case, to add Code section 524(g), which permits bankruptcy courts to issue "channeling" injunctions preventing suits against non-debtors in chapter 11 cases involving asbestos claims. Except for the Ninth Circuit, no Court of Appeals has yet cited to that section or had occasion to consider its effect on prior case law. (*See* Section C below.)

Finally, several factual and legal issues in this case make it an unsuitable vehicle for this Court to address the law in this area. (*See* Section D below.)

A. It Is Premature For This Court To Rule On The Release Of Non-Debtors Because The Plan's Status As A Non-Debtor Is Uncertain.

The Bankruptcy Court has not yet ruled on the question of whether the Plan and its assets are property of the bankruptcy estate. If they are, the Plan's status as a non-debtor will disappear and with it the issue of non-debtor releases. There will only be petitioner's bankruptcy estate -- augmented by several million dollars.

Moreover, the parameters of the assets constituting petitioner's bankruptcy estate could shift so dramatically that the confirmation order itself would be vacated. Thus, when vacating and remanding the ruling excluding the Plan from the

estate, the Nevada District Court not only held that the "bankruptcy plan cannot be confirmed without this issue being resolved," but stayed the appeal of the confirmation order by petitioner's former wife "*until the exemption issue is resolved.*" Respondent's Appendix at 2a (emphasis added).

On the shifting sands of these facts, it is premature for this Court to decide the issue of non-debtor releases. *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916).

B. There Is No Conflict Among The Circuits On The Issue Of Releases Of Non-Debtors.

There is no conflict among the circuits on the issue of a bankruptcy court's authority to release or discharge a non-debtor because no Court of Appeals has actually affirmed such a release or discharge. Two of the four circuits that Petitioner claims have "expressly approved" "the bankruptcy court's power to release non-debtors," Petition at 9, did not actually reach the issue of non-debtor relief because of collateral estoppel and mootness. The other two circuits have affirmed, not releases of non-debtors, but permanent injunctions preventing suits against non-debtors where the injunctions did not release the non-debtors from liability but simply "channeled" the creditors' claims towards funds of money to which the non-debtors had contributed.

In *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973 (1st Cir. 1995), the bankruptcy court confirmed a plan of reorganization that included an injunction preventing lawsuits against non-debtors. *Id.* at 976. The First Circuit held that

Monarch Life, which did not oppose or appeal the confirmation order, was collaterally estopped from challenging the injunction when a non-debtor moved to hold Monarch Life in contempt for violating it. *Id.* at 983. The First Circuit then stated: "*We express no view on the soundness of the precedents* cited in the confirmation order [to support the injunction], nor on their applicability to the particular Plan proposed by [the debtor]." *Id.* at 983-84 (emphasis added).

In *In re AOV Indus., Inc.*, 792 F.2d 1140 (D.C. Cir. 1986),[2] the bankruptcy court confirmed a plan of reorganization that included a release in favor of non-debtors. 792 F.2d at 1143. After the plan was substantially consummated, the district court dismissed appellants' appeal from the confirmation order as moot. *Id.* at 1144. Appellants appealed to the D.C. Circuit, which held that "appellants' claims . . . (*e.g.*, the allegation that the release provisions amount to a third party discharge, in violation of Code § 524(e)) *are moot*" "except to the extent specifically mentioned in this opinion." *Id.* at 1147 (emphasis added).[3]

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[2] Although the various reporting services indicate that the decision reported as *In re AOV Indus., Inc.*, 797 F.2d 1004 (D.C. Cir. 1986), vacates in part the decision reported at 792 F.2d 1140, the services are incorrect. The former decision vacates a decision of the district court on a related appeal from the same bankruptcy case.

[3] Although the D.C. Circuit expressly did not rule on whether the bankruptcy court had the power under Bankruptcy Code sections 105(a) and 524(e) to approve the release of the non-debtors, *id.*, the D.C. Circuit did address the release in one respect. To correct the unequal treatment of different creditors classified together in the

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In *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988), and *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989), the Second and Fourth Circuits affirmed injunctions preventing suits against non-debtors. 837 F.2d 89; 880 F.2d 694. These two cases were very similar -- and very unusual.[4]

In *Johns-Manville*, Manville filed for bankruptcy because of potential mass-tort liability for its asbestos products. When it filed, Manville was litigating against its insurers concerning coverage for its asbestos-related liabilities. To resolve that litigation and to fund the plan of reorganization, Manville and its insurers agreed that the insurers would pay $770 million into a settlement fund in exchange for injunctions providing "protect[ion] from claims based on" any "obligations related to the disputed policies." 837 F.2d at 90. The settlement fund was designed to pay the allowed claims of "all asbestos health victims, both present and future."[5] The Second Circuit found that "the insurance settlements [were] a cornerstone of Manville's proposed plan"

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plan, the D.C. Circuit modified the release to exclude certain claims of one creditor. *Id.* at 1153.

[4] *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1007 (4th Cir.) (describing *Johns-Manville* and *A.H. Robins* as "striking[ly] similar[ ] both factually and on the legal issues"), *cert. denied*, 479 U.S. 876 (1986).

[5] *Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 843 F.2d 636, 640 (2d Cir. 1988).

and that the injunctions were "a critical part of the entire reorganization." *Id.* MacArthur, which claimed to be a co-insured under some of Manville's policies, challenged the injunctions. In affirming, the Second Circuit explained:

> [T]he injunctive orders do not offer the umbrella protection of a discharge in bankruptcy. Rather, they preclude only those suits against the settling insurers that arise out of or relate to Manville's insurance policies. Moreover, claims against the insurers based on Manville's policies [including those of MacArthur] are not extinguished; they are simply channeled away from the insurers and redirected at the proceeds of the settlement.

Id. at 91; *see also id.* at 93-94.

In *A.H. Robins*, Robins faced mass-tort liability for its Dalkon Shield. Robins' plan of reorganization included an injunction preventing "suits that have connection to the Dalkon Shield, against certain entities other than Robins" alleged to have been joint tortfeasors. 880 F.2d at 700. Pursuant to the plan and a class-action settlement previously approved by the Fourth Circuit (the *Breland* settlement), all Dalkon Shield claimants were to recover in full. *Id.* at 700-01.[6] "The Plan's injunction, therefore, only ha[d] real impact

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[6] In *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989) (affirming district court's certification of class and approval of *Breland* settlement), the Fourth Circuit explained the interplay between Robins' plan of reorganization and the *Breland* settlement:

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upon [class] members . . . who ha[d] elected to opt-out of the *Breland* settlement." *Id.* at 701.[7] The Fourth Circuit found that permitting suits against the non-debtors protected by the injunction "would affect the bankruptcy reorganization in one way or another such as by way of indemnity or contribution." *Id.* In affirming the injunction, the Fourth Circuit explained:

> Given the impact of the proposed suits on the bankruptcy reorganization and the fact that the class B members who chose to opt-out could have had their claims fully satisfied by staying within the settlement, the bankruptcy court's

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> The Robins Plan of Reorganization and the *Breland* settlement are intended to provide full payment of all compensatory damages suffered by all Dalkon Shield claimants who have properly filed claims. The Plan creates a Trust fund which will be sufficient to achieve this goal. . . . When the parties have funded the trust, Robins, Aetna and any successor corporations are relieved of any further liability, and this is proper since Dalkon Shield claimants will be paid by the Trust the full value of their claims. Aetna has made a minimal contribution to that fund. But that is not all that Aetna has done to assure the full payment of all Dalkon Shield claimants: It has provided an extra fund of $325 million to protect the Trust against any deficiency that may occur in the Trust Fund.

Id. at 749.

[7] The class certification and settlement established two classes. Class A was a mandatory, non-opt-out class. Of the approximately 111,000 members of class B, only 2,960 opted out of the *Breland* settlement. 880 F.2d at 700, 701 n.7.

> equitable powers support the questioned injunction. We think the ancient but very much alive doctrine of marshaling of assets is analogous here. A creditor has no right to choose which of two funds will pay his claim. The bankruptcy court has the power to order a creditor who has two funds to satisfy his debt to resort to the fund that will not defeat other creditors.

Id.[8]

The plan of reorganization proposed by petitioner bears no resemblance to the plans approved in *Johns-Manville* and *A.H. Robins*. In this case, the "global release" provision in the plan of reorganization and the fact that Resorts was not to receive any distribution would have effectively discharged the Plan in violation of Code section

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[8] *S.E.C. v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285 (2d Cir. 1992), *cert. dismissed*, 506 U.S. 1088 (1993), is another Second Circuit decision affirming a permanent injunction protecting non-debtors. *Drexel* is consistent with *Johns-Manville* and *A.H. Robins*: it is also a mass-tort case (securities fraud) in which the plan of reorganization used an injunction to channel the creditors' "'unimpaired'" claims away from certain non-debtors (Drexel's former directors and officers) and toward certain funds (approximately $800 million including the "Pooled Recovery") to which the non-debtors contributed (through the settlement of lawsuits brought by Drexel and certain creditors). 960 F.2d at 288-89. *See infra* at 13-14 (quoting *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 761 (5th Cir. 1995) (discussing *Drexel*)).

524(e).[9] Resorts' claim would have been "extinguished" and not "simply channeled away" from one source of recovery to another. *Johns-Manville*, 837 F.2d at 91.

The other five cases that petitioner cites as having held that "bankruptcy courts can never . . . confirm reorganization plans that include the release of non-debtor[s]," Petition at 9, also differ from *Johns-Manville* and *A.H. Robins* in that they are not "channeling" cases. Indeed, in one of those cases, the Fifth Circuit expressly reconciled its holding (that the discharge of a non-debtor was improper) with the Second Circuit's holding in *Johns-Manville* on that basis:

> [The debtor and the non-debtor who would have been protected by the injunction] argue that courts have upheld permanent injunctions against third parties in other cases. In those cases, however, the courts upheld permanent injunctions of third-party claims because while the injunction permanently enjoined the lawsuits, it also channeled those claims to allow recovery from separate assets and thereby avoided discharging the nondebtor. *See [Drexel]* (approving settlement that excluded class from sharing in recovery fund because class would receive fair amount from other funds), . . . *[Johns-Manville]* (holding that injunction did not

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[9] Code section 524(e) states: "Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."

> discharge creditor because third-party interest could be asserted against settlement fund) . . . . The injunction at issue in this case provided no alternative means for [appellants] to recover from [the non-debtor] . . . . Accordingly, because the permanent injunction as entered improperly discharged a potential debt of . . . a nondebtor, the bankruptcy court exceeded its powers under [Bankruptcy Code] § 105.

Feld v. Zale Corp. (In re Zale Corp.), 62 F.3d 746, 761 (5th Cir. 1995).[10]

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[10] The other four cases also differ from *Johns-Manville* and *A.H. Robins* in that the creditors' claims were not satisfied through "channeling." In *Union Carbide v. Newboles*, 686 F.2d 593, 594 (7th Cir. 1982), the debtor's president and his wife tried, through a "settlement, satisfaction, and discharge" provision in the debtor's plan, to discharge their liability as guarantors of Union Carbide's loan to the debtor, although the plan paid Union Carbide only $14,337.01 of the approximately $70,000 outstanding on the loan, and there was no indication that Mr. and Mrs. Newboles contributed any money to the plan. The facts of *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621, 626 (9th Cir. 1989), were virtually identical to those of *Union Carbide*; in rejecting the injunction in *American Hardwoods*, the Ninth Circuit stated: "Even if we adopted *[A.H. Robins]*, it would not dictate a different result." In *Underhill v. Royal*, 769 F.2d 1426, 1430 (9th Cir. 1985), the plan provided for the creditors to "get [only] 50% of their principal returned" while releasing "all claims against the debtor, 'any affiliate of the Debtor, and any insider of the debtor.'" Similarly, in *Landsing Diversified Properties-II v. First Nat'l Bank & Trust Co. (In re Western Real Estate Fund, Inc.)*, 922 F.2d 592, 594 (10th Cir. 1990), *modified on other grounds sub nom. Abel v. West*, 932 F.2d 898 (10th Cir. 1991), the bankruptcy court

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In sum, no Court of Appeals has ruled that a bankruptcy court has the power to discharge or release a non-debtor. The only form of "relief" for non-debtors that any circuit court has affirmed is a "channeling" injunction that provides the enjoined creditors with an alternative source of full recovery to which the non-debtors had contributed. This Court need not grant a writ of certiorari to resolve a conflict among the circuits because no conflict exists.

C. It Would Be Premature To Conclude That There Is A Conflict Among The Circuits Because No Circuit Other Than The Ninth Has Yet Considered The Effect Of Bankruptcy Code Section 524(g).

Even assuming *arguendo* that this Court believes that the cases discussed above reflect a conflict among the circuits, it would be premature for the Court to grant a writ of certiorari to resolve the conflict because a recent change in the law may affect the way the circuits rule in the future on non-debtor releases and injunctions.

On October 22, 1994, as part of the Bankruptcy Reform Act of 1994, Congress enacted Bankruptcy Code section 524(g), which expressly permits bankruptcy courts to issue "channeling" injunctions preventing suits against non-

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approved only "in limited amount" the creditor's claim against the debtor and enjoined the creditor from collecting the remainder from a non-debtor. In ruling that the injunction was improper, the Tenth Circuit distinguished *A.H. Robins* and *Johns-Manville*. 922 F.2d at 599.

debtors in a limited class of chapter 11 cases involving asbestos claims. 3 COLLIER ON BANKRUPTCY ¶ 524.07 (15th ed. 1996) (discussing 11 U.S.C. § 524(g)).

No circuit other than the Ninth has yet considered the effect, if any, of section 524(g) on a bankruptcy court's authority to grant relief in favor of non-debtors in cases other than those expressly governed by section 524(g). In the instant case, the Ninth Circuit stated:

> A recent amendment to the Bankruptcy Code buttresses our conclusion that § 524(e) does not permit bankruptcy courts to release claims against non-debtors. . . . That Congress provided explicit authority to bankruptcy courts to issue injunctions in favor of the third parties in an extremely limited class of cases reinforces the conclusion that § 524(e) denies such authority in other, non-asbestos, cases.

Petitioner's Appendix at 20a n.6. This Court should deny certiorari in this case and wait to see whether the other circuits agree with the Ninth Circuit.

D. Even If There Is A Conflict Among The Circuits, This Case Is An Unsuitable Vehicle For Resolution Of That Conflict.

Even if there is a conflict among the circuits regarding a bankruptcy court's power to grant relief to non-debtors through releases or permanent injunctions, this case is not an appropriate vehicle for this Court to resolve that conflict.

1. No Circuit Would Have Affirmed The Release In This Case.

As explained in Section B above, the only cases in the Courts of Appeals affirming any relief in favor of non-debtors are *Johns-Manville*, *A.H. Robins*, and *Drexel*. This case bears no resemblance to those cases, and there is no reason to believe that any circuit would have affirmed the "global release" provision in petitioner's plan of reorganization. Thus, this is not the proper case for this Court to decide when, if ever, a bankruptcy court may have authority to release or enjoin claims against a non-debtor.

Johns-Manville, *A.H. Robins*, and *Drexel* were all cases in which the debtor's plan of reorganization had to address hundreds of millions of dollars of mass-tort claims held by thousands of creditors. This case, in contrast, involves an individual debtor with a mere dozen creditors; one creditor -- petitioner's former wife -- held 95 percent of the value of the claims resolved by the plan of reorganization.

In *Johns-Manville*, *A.H. Robins*, and *Drexel*, there were settlement funds designed to pay the creditors' claims in full, and the injunctions approved by the Courts of Appeals "channeled" the creditors' claims to those funds. In this case, the plan of reorganization made no provision for the payment of any part of Resorts' claim against the Plan, while the "global release" provision would have effectively discharged the Plan. In *Johns-Manville*, *A.H. Robins*, and *Drexel*, the Second and Fourth Circuits found that the injunctions were

essential to the reorganizations.[11] In this case, there was no such finding -- not even by the Bankruptcy Court that confirmed petitioner's plan of reorganization.[12]

In light of these factual distinctions, even the Second and Fourth Circuits would not have affirmed the "global release" provisions in the instant case.

2. Even If A Bankruptcy Court Has The Power To Release A Non-Debtor, The Release In This Case Would Have Been Improper Because The Bankruptcy Court Lacked Subject Matter Jurisdiction.

There is ample authority to support the proposition that a bankruptcy court cannot release claims unless it has

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[11] *See Johns-Manville*, 837 F.2d at 90 ("Since the insurance settlements are a cornerstone of Manville's proposed plan of reorganization, the Bankruptcy Court's [injunctive] orders are a critical part of the entire reorganization.") (citation omitted); *A.H. Robins*, 880 F.2d at 701-02 ("It is essential to the reorganization that these opt-out plaintiffs either resort to the source of funds provided for them in the Plan and *Breland* settlement or not be permitted to interfere with the reorganization and thus with all the other creditors."); *Drexel*, 960 F.2d at 293 ("The Settlement Agreement is unquestionably an essential element of Drexel's ultimate reorganization. In turn, the injunction is a key component of the Settlement Agreement.").

[12] Indeed, the Bankruptcy Court could not have found that the "global release" provision was essential because petitioner, at a hearing on September 23, 1993, initially *agreed* to the Bankruptcy Court's removal of the provision from the plan of reorganization. Petitioner's Appendix at 9a, 10a.

subject matter jurisdiction over those claims.[13] In this case, there has been a final and unappealable ruling that the bankruptcy court lacks jurisdiction over Resorts' claims against the non-debtor Plan.[14]

This is, therefore, not an appropriate case for this Court to resolve the issue of a bankruptcy court's power to release a non-debtor because, even if a bankruptcy court has the power to grant such a release, the release in this case would be invalid for lack of subject matter jurisdiction.

II. THE ISSUE OF WHETHER RESORTS SHOULD HAVE BEEN PERMITTED TO WITHDRAW ITS CLAIM WITH CONDITIONS IS NOT WORTHY OF A WRIT OF CERTIORARI.

Petitioner argues that the Ninth Circuit "improperly impaired the ability of bankruptcy courts to control their own dockets," Petition at 15, when it found that the Bankruptcy

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[13] *See, e.g., Zale*, 62 F.3d at 751 ("Before we address whether the bankruptcy court properly exercised § 105 power to issue the injunction, we must first examine whether a basis for the bankruptcy court's subject matter jurisdiction existed."); *American Hardwoods*, 885 F.2d at 624 ("Subject matter jurisdiction and power are separate prerequisites to the court's capacity to act.").

[14] The District Court ruled: "Because the Pension Plan is not an asset of Lowenschuss's bankruptcy estate, . . . the bankruptcy court lacks jurisdiction over Resorts's claims against the Pension Plan." Petitioner's Appendix at 41a. This ruling is final because, as the Ninth Circuit found, Lowenschuss waived the issue because he did not argue it in his briefs on the merits to the Ninth Circuit. *Id.* at 20a-21a.

Court abused its discretion by denying Resorts' motion to withdraw its proofs of claim with conditions. This argument presents no issue warranting review by this Court.

As a threshold matter, there is no conflict among the Courts of Appeals about the standard governing dismissals of actions,[15] which is abuse of the trial court's discretion.[16] Nor is there any disagreement that this discretion is judicial rather than arbitrary and that a court must consider the equities presented by the plaintiff as well as by the defendant.[17]

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15 Bankruptcy Rule 3006 is "nearly identical to Fed. R. Civ. P. 41(a), and was, in fact, originally derived from that rule." *Smith v. Dowden*, 47 F.3d 940, 943 (8th Cir. 1995); *see also* Advisory Committee Note to B.R. 3006 (1983). To adjudicate claims under B.R. 3006, courts rely upon the case law governing dismissals under Fed. R. Civ. P. 41(a). *Smith*, 47 F.3d at 943.

16 *E.g.*, *Metropolitan Fed. Bank of Iowa, F.S.B. v. W.R. Grace & Co.*, 999 F.2d 1257, 1262 (8th Cir. 1993); *DWG Corp. v. Granada Invs., Inc.*, 962 F.2d 1201, 1202 (6th Cir. 1992); *American Nat'l Bank & Trust Co. v. BIC Corp.*, 931 F.2d 1411, 1412 (10th Cir. 1991); *New Mexico ex rel. Energy & Minerals Dep't v. U.S. Dep't of the Interior*, 820 F.2d 441, 443 (D.C. Cir. 1987); *Davis v. USX Corp.*, 819 F.2d 1270, 1273 (4th Cir. 1987); *McCants v. Ford Motor Co.*, 781 F.2d 855, 857 (11th Cir. 1986); *Puerto Rico Maritime Shipping Auth. v. Leith*, 668 F.2d 46, 49 (1st Cir. 1981); *Sams v. Beech Aircraft Corp.*, 625 F.2d 273, 277 (9th Cir. 1980); *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976); *Stern v. Barnett*, 452 F.2d 211, 213 (7th Cir. 1971); *Larchmont Eng'g, Inc. v. Toggenburg Ski Ctr., Inc.*, 444 F.2d 490, 491 (2d Cir. 1971); *Young v. Wilky Carrier Corp.*, 150 F.2d 764, 764 (3d Cir. 1945), *cert. denied*, 326 U.S. 786 (1946).

17 *See Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984) ("'the discretion vested in the court is a judicial and not an arbitrary one'") (citation omitted); *Alamance Indus., Inc. v. Filene's*, 291 F.2d

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The review of Resorts' withdrawal required the Ninth Circuit and the District Court to conduct an extensive examination of the facts. Petitioner's Appendix at 13a-17a, 42a. This Court has underscored repeatedly that it "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Berenyi v. District Director, Immigration & Naturalization Serv.*, 385 U.S. 630, 635 (1967).

Moreover, this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). In this case, the Ninth Circuit and District Court concurred in their view of the facts. Because petitioner has made no showing of error -- much less "exceptional error" -- this Court has no reason to review the withdrawal of Resorts' proofs of claim.

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142, 147 (1st Cir.) (vacated and remanded district court's refusal to dismiss action when that court had failed to weigh equities), *cert. denied*, 368 U.S. 831 (1961). *See also Davis*, 819 F.2d at 1273 (held that district court abused its discretion by denying motion for voluntary dismissal when plaintiff refused to comply with unreasonable condition); *LeCompte*, 528 F.2d at 604 (when plaintiff did not acquiesce in voluntary dismissal with conditions, court vacated dismissal and remanded to trial court to ascertain whether defendants would be prejudiced by unconditional dismissal); *American Nat'l Bank*, 931 F.2d at 1412 (held that district court did not abuse its discretion when it permitted voluntary dismissal and refused to include a condition that did not actually alleviate harm to defendant); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2364 at 297 (West 1995).

III. THE ISSUE OF WHETHER RESORTS' APPEAL IS MOOT IS NOT WORTHY OF A WRIT OF CERTIORARI.

Petitioner's argument that Resorts' appeal should have been dismissed as moot is not a reason for this Court to grant a writ of certiorari. The standard for mootness is well settled: an appeal is not moot if a court can fairly and justly fashion effective relief.[18] Petitioner concedes that this is the standard. Petition at 18 ("if a court is unable to fashion effective relief, it must dismiss an action as moot") (citing *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990)).

The determination of mootness is by its very nature factually intensive, especially in a bankruptcy appeal.[19] This

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[18] *E.g.*, *Manges v. Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034, 1038-39 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1105 (1995); *Spirtos v. Moreno (In re Spirtos)*, 992 F.2d 1004, 1006-07 (9th Cir. 1993); *Official Comm. of Unsecured Creditors of LTV Aerospace & Defense Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.)*, 988 F. 2d 322, 325 (2d Cir. 1993); *In re Andreuccetti*, 975 F.2d 413, 418-19 (7th Cir. 1992); *Rochman v. Northeast Utils. Serv. Group (In re Public Serv. Co. of N.H.)*, 963 F.2d 469, 471 (1st Cir.), *cert. denied*, 506 U.S. 908 (1992); *First Union Real Estate Equity & Mortgage Invs., Inc. v. Club Assocs. (In re Club Assocs.)*, 956 F.2d 1065, 1069 (11th Cir. 1992); *Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., Inc.*, 841 F.2d 92, 96 (4th Cir. 1988); *AOV*, 792 F.2d at 1147; *Unsecured Creditors' Comm. of DeLorean Motor Co. v. DeLorean (In re DeLorean Motor Co.)*, 755 F.2d 1223, 1226 (6th Cir. 1985).

[19] *E.g.*, *Andreuccetti*, 975 F.2d at 418 ("[D]etermining whether an appeal has become moot requires a fact-specific inquiry into the nature of the relief sought, and the effects the relief could have on the overall reorganization plan."); *Club Associates*, 956 F.2d at

[Footnote continued on next page]

issue would therefore require this Court to perform a detailed review of the facts of this case. This is not a proper basis for granting a writ of certiorari. *See Johnston*, 268 U.S. at 227.[20]

[Footnote continued from previous page]

1069 ("[A] court must still consider all the circumstances of the case to decide whether it can grant effective relief."); *Central States*, 841 F.2d at 96 ("The court should reach a [mootness] determination upon close consideration of the relief sought in light of the facts of the particular case."); *AOV*, 792 F.2d at 1148 ("In exercising its discretionary power to dismiss an appeal on mootness grounds, a court cannot avoid its obligations to scrutinize each individual claim, testing the feasibility of granting the relief against its potential impact on the reorganization scheme as a whole.").

[20] Furthermore, petitioner cites no case in which an appeal from the confirmation of the plan of an individual debtor was held to be moot where the exemption of pension plan funds was in dispute. *Cf. Spirtos*, 992 F.2d at 1006-07 (in individual debtor case, appeal from order finding two pension plans exempt was not moot even though debtor had "stripped the plans of their assets"). This lack of legal precedent further supports denial of certiorari on the issue of mootness.

CONCLUSION

For the reasons set forth above, and in the opinions of the Ninth Circuit and the District Court, respondent respectfully requests that this Court enter an order denying the petition for a writ of certiorari.

Dated: May 10, 1996

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

In Re:

FRED LOWENSCHUSS,

Debtor.
_____/

BEVERLY SELNICK,

Appellant, CV-N-93-778-ECR

v. **MINUTES OF THE COURT**

FRED LOWENSCHUSS, **DATE: August 18, 1994**

Appellee.
_____/

MINUTE ORDER IN CHAMBERS

The above entitled case, Selnick v. Lowenschuss (CV-N-93-778) was reassigned to this Court (document #25) so that this appeal from the bankruptcy court's confirmation of the bankruptcy plan (document #26) could be considered together with the appeal from the bankruptcy court's decision to exempt the debtor's pension plan from the bankruptcy estate (already before this Court in Selnick v. Lowenschuss (CV-N-93-565-ECR).

This Court issued an order in Selnick v. Lowenschuss (CV-N-93-565-ECR) finding that the bankruptcy court's

decision to exempt the debtor's pension plan from his estate should be vacated and that the matter shall be remanded to the bankruptcy court to be considered in light of all of the relevant evidence.

The bankruptcy plan cannot be confirmed without this issue being resolved. IT IS, THEREFORE, HEREBY ORDERED that the appeal from the bankruptcy confirmation plan shall be STAYED until the exemption issue is resolved.

CAROL C. FITZGERALD, CLERK

By /S/ Deputy Clerk
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

In Re:

FRED LOWENSCHUSS,

Debtor.
_____/

BEVERLY SELNICK,

Appellant, CV-N-93-565-ECR

v.

ORDER

FRED LOWENSCHUSS,

Appellee.
_____/

This case is before this Court on appeal from the Bankruptcy Court's order excluding from the bankruptcy estate (and therefore access by creditors--including Appellant Selnick) Debtor/Appellee's pension plan (the "Pension Plan"). The Pension Plan was excluded on the grounds that it was a multi-employee plan governed by ERISA and, therefore, protected from Appellant Selnick's claim under *Patterson v. Shumate,* 112 S. Ct. 2241 (1992).

The record shows that Debtor, Fred Lowenschuss, after refusing to comply with an equitable distribution order by a Pennsylvania Court and pursuing other efforts to nullify said distribution order, moved to Nevada in 1992 and instituted the underlying bankruptcy proceeding for

reorganization. Debtor scheduled $164,259.60 in assets (consisting primarily of claims against others of admittedly questionable worth), and liabilities of $9,121,457.54 of which more than $5,000,000 consisted of valid and final judgments obtained by Selnick as her share of the equitable distribution of marital property. Debtor declared in his schedules that his interest in the Pension Plan of his wholly owned professional corporation was exempt from the claims of his creditors, including Appellant Selnick.

Selnick objected to the claim of exemption on the grounds of *res judicata* because final orders had been given by both a Pennsylvania Court and a Texas Court. However, without hearing any evidence on that issue, the bankruptcy judge determined that the Debtor's claims for exemption were not barred on *res judicata* grounds. The bankruptcy judge decided that the Pension Plan had multiple participants as of August 24, 1992 (the date of the bankruptcy filing) and, therefore that it was ERISA-controlled, and that the exemption of the Pension Plan funds was proper. He then adopted the Debtor's proposed findings of fact and conclusions of law. Selnick's Motion for Reconsideration was denied and this appeal followed.

This Court is prepared to rule on the Appeal (document #23), Appellant's Motion to Strike Appellee's Brief (document #26), and Appellant's Objection to Appellee's Statement of Issues on Appeal (document #32).

First we will address the Motion to Strike Appellee's Brief and Objection to Appellee's Statement of Issues on Appeal together. Appellant contends that Appellee's brief raises issues that have not been designated for appeal and

contains impermissible references to documents which are not properly contained in the Record on Appeal.

As to the issues raised on appeal, both the petitioner and the respondent agree that whether Debtor's interest in the ERISA pension plan was properly excluded as property of the estate is properly before the Court. However, appellee also raises two additional issues: 1) Whether the appeal filed on behalf of Selnick is moot since confirmation of the plan of reorganization was premised on the order excluding the pension plan as property of the estate, and there was no stay of that order prior to the hearing and decision on plan confirmation; and 2) Whether Selnick filed a timely objection before the bankruptcy court to the exclusion of Debtor's interest in the pension plan.

The allegation of mootness has already been rejected by this Court's Order of April 28, 1994 (document #41) and need not be addressed further.

The argument that the issue of the failure of Appellant to properly object to the exclusion of ERISA qualified pension plan was not identified in the statement of issues on appeal is a valid issue for this Court's consideration. Rule 8006 of the Federal Rules of Bankruptcy Procedure specifies that:

> . . . Within 10 days after the service of the statement of the appellant the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal, and if the appellee has filed a crossappeal, the appellee as cross appellant shall file and serve a statement of the issues to

> be presented on the cross appeal and a designation of additional items to be included in the record . . . .

This Court agrees with the appellee that the Rule does not prohibit amendment to the statement of issues. Appellee has amended his statement of issues and appellant had an opportunity to brief the issue in her reply brief. Appellant is not prejudiced by the Court's consideration of this issue. In addition, the bankruptcy court never addressed the issue of the failure of Appellant to object to the exclusion of the ERISA pension plan. The Appellee therefore, is not required to file either an appeal or cross-appeal because there was no adverse ruling. The issue was properly raised before the bankruptcy court and never ruled upon, and this appellate court may consider this undecided issue.

As to appellee's references to the record on appeal this Court finds as follows: The accuracy of the parties statements will be verified by the Court's review of the record. Those portions of the briefs that do not refer to material entered on the record on appeal will not be considered. In addition, the depositions of Litt, Lomanaco and Lardini will not be considered. The record shows that these depositions were not filed with the bankruptcy court until well after the court had already entered its Findings of Fact, Conclusions of Law and Judgment in this matter. The Findings of Fact, Conclusions of Law and Judgment were entered on July 22, 1993. The depositions were not filed with the court until August 13, 1993. It does not appear the bankruptcy court considered these deposition even in light of the fact that Debtor's attorney briefly announced that he took such depositions while presenting his oral argument before the bankruptcy court (transcript 7/1/93 p. 141). Papers which are

not filed with the lower court or admitted into evidence are not part of the record and cannot be part of the record on appeal. *Kirshner v. Uniden Corp. of America*, 842 F.2d 1074, 1077 (9th Cir. 1988). Moreover, papers which are submitted to the lower court after the ruling which has been challenged was made should be stricken from the record on appeal. *Id.* We are concerned only with the record before the bankruptcy judge when his decision was made.

We are now prepared to entertain the appeal on its merits. The legal rulings of the Bankruptcy Court, as to both state and federal law, are subject to *de novo* review. *In re Daniel*, 771 F.2d 1352 (9th Cir.) *cert. den.*, 475 U.S. 1016 (1986). The Bankruptcy Court's findings of fact are subject to the clearly erroneous standard of F.R.C.P. 52(a) *Id.; In re Comer*, 723 F.2d 737 (9th Cir. 1984).

The issues on appeal are as follows:

(1) Whether Appellant failed to properly object to the exclusion of the ERISA pension plan.

(2) Whether the bankruptcy court was barred, under principles of *res judicata* and full faith and credit from permitting Debtor to relitigate whether his Pension Plan assets are exempt from the claim of his former wife, Selnick, where prepetition final orders of the Pennsylvania and Texas Courts have previously established here [sic] entitlement to a portion of these assets.

(3) Whether as a matter of law, notwithstanding the bankruptcy court's rulings

the debtor was the sole participant in his pension plan such that it was not subject to ERISA and was properly subject to the judgment obtained against it and the Debtor by Selnick prior to the commencement of these proceedings.

(4) Whether the Bankruptcy Court improperly excluded material evidence bearing on the Debtor's credibility, the scope of the prior state court proceedings and expert opinion on the requirements for a multi-employee pension plan under ERISA.

A. Background

The appellant in this matter was formerly the Debtor's wife. Appellant instituted divorce proceeding in 1981. Only after almost ten years of litigation was the Court of Common Pleas of Montgomery County, Pennsylvania (the "Divorce Court") able to grant a Decree of Divorce and make findings with respect to the Lowenschuss marital property which he valued at $10,576,300. The judge in those proceedings awarded each of the parties a "fair distribution of the marital property" finding that they should share equally in the marital assets.

The judge ordered that appellant Selnick should receive 1) the equity in the parties' former marital home; 2) $830,000 plus $464,900 in interest for marital assets improperly diverted or dissipated by the Debtor; and 3) $3,173,490 which the Debtor was directed to pay from the Pension and Profit Sharing Plan and certain other payments. The judge held that awarding all of these items would require

less dependence of Selnick on the Pension and Profit Sharing plan and reduce the percentage due her to 38.7% or $3,173,490. The judge apparently was concerned, due to Debtor's past conduct, that Debtor would attempt to minimize any monies due to the plaintiff. The judge also specified who would be responsible for the tax liability and any penalties for liquidating the pension plan.

Debtor was given 90 days to complete the transactions required according to the equitable distribution decree. Instead of transferring the assets as ordered however, he transferred his Pension Plan assets from Philadelphia, Pennsylvania to Sun Bank in Florida and Santa Barbara Bank & Trust Company in California. The Debtor failed to make any of the transfers of property to Selnick ordered by the judge, including the $3,173,490 that was to have come from the Pension Plan.

The Debtor, filed and argued a post-trial motion and filed an appeal to the Superior Court of Pennsylvania. In the post 1991 Order proceedings, the Debtor's attorneys only questioned the "fairness" of the judge's equitable distribution. The Debtor never appealed from the judge's order assuming jurisdiction over the Pension Plan. The Debtor's application to the judge who issued the equitable distribution order, the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania for a supersedeas were all denied.

Ultimately Selnick filed a Petition for Contempt and Enforcement based upon the Debtor's non-performance and a hearing was scheduled on that petition. Debtor was ordered to bring any and all documents which reflect the assets held in Fred Lowenschuss Associates, Attorneys at Law Pension and Profit Sharing Plan to that hearing. The Debtor failed to

appear or produce any documents at that scheduled hearing and the Pennsylvania Court issued a Bench Warrant for his arrest, and ordered him to answer the Notice to Produce.

At the second scheduled hearing Debtor again failed to produce the required documents or appear; however, on that date, the Debtor's attorneys filed an "Answer and New Matter to Wife's Petition for Contempt and Enforcement" which included the claim that the judge's order was invalid under ERISA. The answer also included the argument that because the judge did not frame his equitable distribution order as a Qualified Domestic Relations Order (QDRO) it was not valid.

The judge determined that the ERISA arguments had been raised in the post-trial argument and rejected, and entered an Order on February 10, 1992 freezing "all assets, bank accounts, brokerage accounts, Fred Lowenschuss Associates Pension Plan, Fred Lowenschuss IRA, or any other account, asset, trust or property subject to the control of Fred Lowenschuss except upon further order of the Court,["] and issued another bench warrant for the Debtor's arrest for failure to appear. The bench warrants were never successfully executed because the Debtor left Pennsylvania.

The Pennsylvania Superior Court quashed Debtor's appeal from the 1991 Divorce and Equitable Distribution Order with prejudice and the Debtor's "Cross Motion to Vacate the Order of February 10, 1992 of the Common Pleas Court as Well as All Arrest Orders" was also denied. Debtor did not appeal those decisions.

On March 13, 1992 the Pennsylvania judge entered judgment in favor of Selnick and against both the Debtor and

the Pension Plan in the amount of $5,345,090 plus interest. Debtor appealed and Selnick moved to quash the appeal. Ultimately the appeal was dismissed without prejudice due to the bankruptcy action at issue and the federal bankruptcy stay granted pursuant to that action.

Meanwhile, Debtor had attempted to prevent enforcement of the Judgment against the Pension Plan assets in Pennsylvania, Texas, Minnesota, California, Florida, Oklahoma, New York and New Jersey. On May 12, 1992 Selnick instituted an action in the District Court of Harris County, Texas to enforce her Judgment against certain Pension Plan assets. The Debtor resisted execution on the basis of their contention that the judge lacked power, without a QDRO, to enter either his original equitable distribution order of July 19, 1991 or his Judgment on March 13, 1992 against the Pension Plan.

The Texas Court denied all of Debtor's motions and concluded that a final judgment against Debtor Fred Lowenschuss and the Fred Lowenschuss Associates, Attorneys at Law Pension and Profit Sharing Plan had been properly authenticated by the rendering jurisdiction of the Montgomery County, Pennsylvania Court and that he judgment was entitled to be accorded full faith and credit.

B. Analysis

With regard to the issue of whether Selnick's objections to the claims of exemption was timely filed, this Court finds that the objection was timely filed and free from any procedural defect. Federal Rule of Bankruptcy Procedure 4003 provides that a creditor may file objections to a claim of exemption within thirty days after the first meeting of the

creditors. The Debtor concedes that the Objection was timely filed.

Rule 4003 further provides, "Copies of the objection shall be delivered or mailed to the trustee and to the person filing the list, and the attorney for such person." The Debtor's attempt to invalidate the Objection is based on the argument that the Objection was never served nor service verified by an affidavit of service. However, the original Objection, which was timely filed, conforms exactly with the Amended Objection which was served as well as filed 9 days later. The Court further notes that Debtor's argument can only be disingenuous considering the manner and scheduling of his objections to the Pennsylvania Court's equitable distribution order of 1991.

With regard to the issue of whether the bankruptcy court should not have permitted Debtor to relitigate whether Selnick has an interest in the Pension plan and other assets, the record shows that there is evidence, not considered by the bankruptcy court, that the Pennsylvania Court did address the issue of whether or not the Pension Plan could be exempted and ultimately found that Selnick had a right to it the proceeds [sic] from the plan. The Court[s] also found that the equitable distribution order did not have to be presented in the form of a QDRO. Furthermore, it is undisputed that the Pennsylvania judge's order contained all the information required in a QDRO and that the judge determined that he need not file the order in the form of a QDRO. It appears that the bankruptcy court failed to consider this evidence. If true, it appears the Pennsylvania court's award to Selnick of a property interest in, and then a judgment against the pension plan were valid and final Pennsylvania orders, rendered before the present proceeding was instituted. Although we are in no

way bound or influenced by it, this finding is consistent with the Texas Court's finding in its order affording the Pennsylvania orders full faith and credit.

The Court further notes that, right or wrong, the Pennsylvania Court's decision in that case would be binding on this Court. However, it appears that the judge's conclusion that he could properly enter judgment against the Pension Plan was correct. An interest in a pension plan is "marital property" and as such, subject to equitable distribution under the Pennsylvania Divorce Code. *Zollars v. Zollars*, 579 A.2d 1328 (Pa. Super. 1990); *Miller v. Miller*, 577 A.2d 205 (Pa. Super. 1990). It appears then that the order awarding Selnick 38.7% of the Debtor's interest in the Pension plan was in accordance with Pennsylvania law.

Appellant is also correct in asserting that *Res Judicata*, or claim preclusion bars relitigation of claims between the same parties if those claims were actually litigated *or could have been litigated*. *See*, e.g. *In re Daley*, 776 F.2d 834 (9th Cir. 1985). The bankruptcy court did not address this issue or consider any evidence on whether or not the claims were or could have been litigated. *Res Judicata* insures the finality of decision. A final judgment on the merits bars further claims by parties or their privities based on the same cause of action. The theory behind *res judicata* was emphasized in the case cited by Debtor, *Brown v. Felson*, 442 U.S. 127 (1979). Debtor attempts to make the argument that an intermediate court's decision holding that res judicata precludes a creditor from contending that a Debtor's debt to him was not dischargeable, is reversible. Although in *Brown v. Felson*, the Supreme Court did reverse the bankruptcy and intermediate court decision holding that res judicata precluded

such an argument, the decision was narrowly focused on the facts of that case which are inapposite to the facts of this case.

As to the issue of whether the Debtor's plan was ERISA qualified, this court finds that there is evidence in the record, not considered by the bankruptcy court that shows that the Debtor's plan was not ERISA qualified and therefore should not have been exempted from the Debtor's estate under *Patterson v. Shumate*, 112 S. Ct. 2242 (1992). In *Patterson*, the Supreme Court held that the assets of a truly qualified multi-participant ERISA pension plan (in that case involving 400 participants) are excludable from the bankruptcy estate of the plan participant. The Supreme Court in *Patterson* premised its opinion on the fact that the pension plan there was an ERISA-qualified plan. However, the record suggests that the *Patterson* principle has no relevance here and that this case is more analogous to *In re Hall, Debtor*, 151 B.R. 412 (W.D. Mich. 1992). In *Hall* the court considered a Debtor's claim of exemption for a pension plan of which, at the time of Debtor's bankruptcy, the Debtor and his spouse were the sole participants and the only shareholders of the company which established the plan. There, as in this case, no contributions were being made currently on behalf of other employees, although such contributions had been made for a period in the past. There as here, the Debtor claimed his interest in the pension plan was entitled to ERISA exemption because his plan was "ERISA qualified." The court held that because the plan currently had no participants other than the owner of the business, the plan was not an "employee" plan and, therefore not ERISA governed. Thus the Debtor's interest in the plan was not exempt from the claims of his creditors. It appears that there is evidence in the record that was not considered by the bankruptcy court, that shows that Debtor's pension plan

was not ERISA qualified because Debtor was really the only participant and in addition, even if there were other plan participants, the Debtor failed to make contribution to the pension plan for the other employees. This Court is very skeptical of the finding that the Debtor's sons were participants in the plan, and their participation was sufficient to make the plan an exempt asset. Had the bankruptcy court considered all the evidence, this court questions if the same finding would have been made.

Consequently, this Court's decision of this matter rests on the final issue -- whether the bankruptcy court excluded material evidence relevant to the Debtor's credibility, the scope of the state court proceedings and ERISA requirements for a pension plan. As stated above, this Court finds that the bankruptcy court failed to take into account relevant evidence which it must do before rendering a decision that is reviewable by this Court. Namely, this Court finds that the bankruptcy court's refusal to admit evidence, evidence originally specifically requested of the appellant by that court, regarding the Res Judicata and full faith and credit issue was inappropriate. Moreover, this Court finds that the bankruptcy court's refusal to consider all the relevant evidence regarding the qualification of Debtor's Pension Plan as an ERISA plan, is error.

For this reason, this Court determines that the case is not ripe for the entry of final judgment on the issue of exemption.

IT IS THEREFORE HEREBY ordered that the bankruptcy court's decision regarding the res judicata issues and the exemption of the Pension Plan are VACATED and

this case is REMANDED to the bankruptcy court to determine these issues in light of all the relevant evidence.

IT IS FURTHER ORDERED that the bankruptcy court convene and conclude the taking of testimony and in that connection:

a. admit in evidence the deposition and related exhibits of Albert Momjian, Esq.;

b. permit Saul Levit, Esq. to testify to matters referred to in Selnick's Motion for Reconsideration as to which Mr. Levit was to have testified for the first time, and which have not been covered by other witnesses;

c. permit Jerome Kellner, CPA to testify on the matters related to his knowledge regarding Selnick's Motion for Reconsideration;

d. admit into evidence expert opinions from the testimony of the Debtor and Mr. Bolden in the Divorce Case as to the number of Pension Plan participants at that time;

e. admit the evidence of other failures of the Debtor to produce relevant documents tendered on July 1, 1993;

f. permit the Debtor to tender any additional evidence on the Exemption issue and permit Selnick to tender any evidence responsive to that in rebuttal; and

g. permit Selnick leave to petition to the Pennsylvania Court to restate its Equitable Distribution order as a QDRO.

DATED: August 19, 1994.

/S/ Edward C. Reed

UNITED STATES DISTRICT JUDGE

(3)

No. 95-1348

Supreme Court, U.S.
FILED
MAY 22 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

FRED LOWENSCHUSS,
Petitioner

v.

RESORTS INTERNATIONAL, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

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DATED: May 20, 1996

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No. 95-1348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

FRED LOWENSCHUSS,
Petitioner

v.

RESORTS INTERNATIONAL, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

Respondent's Brief in Opposition totally side-steps the important issue under the Bankruptcy Code on which the circuits are split and which cries out for resolution through certiorari. It is the question of whether bankruptcy courts have equitable power under section 105(a) of the Bankruptcy Code to confirm Chapter 11 plans of reorganization that release or enjoin claims against non-debtors, or whether bankruptcy courts are totally prohibited from doing so by section 524(e). In its decision in the present case, the Ninth Circuit has erected an Iron Curtain that would forever deprive bankruptcy courts of this valuable tool, which is frequently used to advantage by bankruptcy courts in many other circuits. The obvious conflict

among the circuits on this issue has been recognized by commentators and by the courts themselves, despite respondent's vain attempt to deny its existence. Resorts also ignores the fact that non-debtor releases had been part of its *own* Chapter 11 reorganization, which was confirmed by the U.S. Bankruptcy Court for the District of New Jersey.[1]

The absolute prohibition laid down by the Ninth Circuit would unduly hamstring bankruptcy courts in their fashioning of workable reorganizations, as is clearly demonstrated by the present case. Here we have a situation in which the bankruptcy court, in order to control its own docket and to confirm a plan of reorganization, enjoined a creditor (respondent, Resorts International, Inc.) from proceeding against a non-debtor (the Fred Lowenschuss Associates Pension Plan), *after the creditor had chosen voluntarily to withdraw with prejudice its same claim against the debtor* (Fred Lowenschuss), who was the alleged agent of the non-debtor and upon whose actions the claim against the non-debtor was based.

Although the bankruptcy court had given Resorts the opportunity to try its claim on the merits, Resorts *refused to do so.* Instead, it sought to withdraw its claim "with prejudice," but with the condition that it could reassert the claim later if certain events occurred. Because such conditions would have effectively held the bankruptcy proceedings in limbo, they were correctly rejected by the bankruptcy court. Resorts still refused to try its claim, and instead withdrew the claim *unconditionally with prejudice,* over the debtor's objection. The bankruptcy court then confirmed a plan of reorganization that was primarily funded by the non-debtor (the Pension Plan) and which released and enjoined claims against the Pension Plan. Such an injunction was particularly crucial to the success of the reorganization because Resorts had obtained, in the context of its *own* bankruptcy proceedings, a section 105 injunction that restricted payments from the Pension Plan.

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1. *In re Resorts Int'l, Inc.*, 145 Bankr. 412, 421 (Bankr. D.N.J. 1990). See Petition at 11.

If the bankruptcy court had been allowed to control its docket as it had wished, this matter would have already been concluded. However, Resorts' maneuverings have now tied up petitioner's bankruptcy proceedings for nearly three years. Even more outrageous is Resorts' vicious *ad hominem* attack against petitioner in its Brief in Opposition. Resorts' insinuations of "fraud" are, in reality, based on nothing more than the fact that petitioner, as trustee, had cashed in the Pension Plans' shares of Resorts stock *in accordance with the terms of Resorts' own tender offer*, which Resorts thereafter asserted was in violation of Delaware state law. See Petition at 4-5. Furthermore, it is supreme hypocrisy for Resorts to impugn petitioner for failing to turn over Pension Plan assets to his ex-wife pursuant to a state court order, when *Resorts itself* had obtained a bankruptcy court order to *enjoin* such payments from the Pension Plan. Resorts is, in fact, trying to undermine the very reorganization plan that is making payments to petitioner's ex-wife possible.[2]

As pointed out in the Petition, this is a particularly appropriate opportunity for the Supreme Court to review the issue of non-debtor releases and injunctions, because this is likely to be the last such case from the Ninth Circuit, due to the blanket prohibition expressed in the Ninth Circuit's opinion.

I. The Split Among the Circuits Has Been Recognized by the Circuit Courts and Commentators Alike.

While respondent claims that there is no conflict among the circuits on the issue of a bankruptcy court's power to grant non-debtor releases, respondent concedes in its brief that the Second and Fourth Circuits have "affirmed injunctions preventing suits against non-debtors." Respondent's Brief at 9. In

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2. See Petitioner's Appendix at 25a-32a. Resorts is not only attempting to prevent the Pension Plan from making further payments under the plan of reorganization, but also to require the trustee to personally repay all distributions made in accordance with the plan. See Petition at 7.

addition, Respondent's brief fails to address the fact that the Fourth, Fifth, and Seventh Circuits have all departed from the Ninth Circuit in refusing to read section 524(e) as an absolute prohibition against non-debtor discharges.[3]

Respondent has erroneously stated that "there is no conflict among the circuits on the issue of a bankruptcy court's authority to release or discharge a non-debtor because no Court of Appeals has actually affirmed such a release or discharge." Respondents Brief at 7. Yet Respondent admits that circuit courts have affirmed non-debtor discharges in the *Johns-Manville, A.H. Robins,* and *Drexel* cases.[4] Respondent's Brief at 8-12. Respondent has attempted to differentiate between non-debtor releases and permanent injunctions, although the circuit courts have held that no distinction should be made between the two.[5]

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3. See, e.g., *In the Matter of Specialty Equipment Companies, Inc.*, 3 F.3d 1043, 1046-1047 (7th Cir. 1993); *In re A.H. Robins, Inc.*, 880 F.2d 694, 702 (4th Cir. 1989); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987) (section 524(e) does not by its specific words preclude all non-debtor discharges, which have been accepted and confirmed as an integral part of a plan of reorganization).

4. Respondent attempts to distinguish the cases of *MacArthur Co. v. Johns-Manville Corp. (in re Johns-Manville Corp.)*, 837 F.2d 89 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988), *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989), and *In re Drexel Burnham Lambert Group*, 960 F.2d 285 (2d Cir. 1992), *cert. dismissed, sub nom., Hart Holding Co. v. Drexel Burnham Lambert Group*, 113 S.Ct. 1070 (1993), from the petitioner's case. However, the commonality of the cases is that the release of the non-debtor entity was necessary for a successful reorganization. In this case, the non-debtor pension plan is contributing over three million dollars to the plan of reorganization, without which funding a reorganization would not be possible.

5. See, e.g., *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621, 626 (9th Cir. 1989)(noting that Section 524(a)(2) of the Bankruptcy Code describes a discharge as an injunction and concluding that a discharge is a special kind of permanent injunction); *See also* Boyle, *Non-Debtor Liability in Chapter 11: Validity of Third-Party Discharge in Bankruptcy*, 61 FORDHAM L. REV. 421 (1992), which states: "In effect a discharge is an injunction, and any attempt to distinguish the two is an unpersuasive semantic exercise." *Id.* at 429.

In addition, the circuit courts themselves, as well as legal commentators, have recognized the difference in treatment among the various circuits on the issue of non-debtor releases. In *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973 (1st Cir. 1995), a case cited by respondent in its Brief in Opposition, the Court of Appeals affirmed the district court's upholding of the bankruptcy court's release of a non-debtor and discussed at length the two conflicting lines of cases with respect to non-debtor releases.[6] In addition, various law review articles have noted the split in the circuits and have discussed the different approaches to non-debtor discharges.[7] The number of bankruptcy courts throughout the country which have used non-debtor releases in confirming plans of reorganization is nothing short of astounding. See Petition at 8, n.7. Therefore, any attempt by respondent to deny that such a split in authority exists among the circuits is misplaced if not disingenuous.

The Ninth Circuit's blanket prohibition against non-debtor releases is in conflict with the circuit courts that have refused to read section 524(e) as absolutely precluding the release of non-debtors. This has raised an issue of national importance as to whether bankruptcy courts will be allowed to use non-debtor releases as a tool to fashion workable reorganizations in appropriate cases.

II. The Release of the Pension Plan Was Warranted Because Resorts Voluntarily Withdrew Its Claim with Prejudice.

Respondent argues that no circuit would affirm the release in this case because it effectively extinguishes Resorts' claim. Respondent's Brief at 12-13. However, the Bankruptcy Court's release of the Pension Plan was fully warranted because Re-

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6. *Monarch, supra*, 65 F.3d at 979-980.

7. *See, e.g.*, Leal, *The Power of the Bankruptcy Courts: Section 105*, 29 S. TEX. L. REV. 487 (1988); Cook and Brener, *Third-Party Releases in Chapter 11 Reorganization Plans*, 611 PLI/COMM. 369 (1992), Han, *Testing the Limits of Judicial Discretion in Chapter 11: The Doctrine of Necessity and Third Party Releases*, 94 ANN. SURV. AM. L. 551 (1994).

sorts' itself had *voluntarily withdrawn its claim with prejudice.*[8] Resorts had pursued the debtor for three years as a creditor of petitioner's bankruptcy and, on the eve of the trial of its claims, Resorts chose to withdraw its claims on the condition that it be able to reassert them if the Pension Plan was later determined to be property of the bankrupt estate. See Petition at 6. The Bankruptcy Court properly instructed Resorts either to litigate its claims on the merits or to withdraw its claims without condition. Because Resorts chose to withdraw unconditionally with prejudice, it was perfectly proper and equitable for the Bankruptcy Court to release the Pension Plan.

Furthermore, the Bankruptcy Court was justified in enjoining actions by Resorts against the Pension Plan, under the analysis of part three of the *Otero Mills* test for granting a non-debtor injunction (Petition at 12-13). *In re Otero Mills, Inc.*, 21 Bankr. 777 (Bankr. D.N.M. 1982), *aff'd*, 25 Bankr. 1018 (D.N.M. 1982). Under part three of the *Otero Mills* test, release of the Pension Plan would result in "no harm or minimal harm" to Resorts because Resorts claim against the Pension Plan was already extinguished by its voluntary withdrawal with prejudice (See Petition at 13, n.15.)[9] In addition, the injunction was necessary to prevent Resorts from blocking the use of Pension Plan assets to fund the reorganization.

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8. Debtor requested that Resorts be required to litigate its claim. The Bankruptcy Court, *over Debtor's objection*, allowed Resorts to voluntarily withdraw its claim with prejudice.

9. Resorts voluntarily withdrew with prejudice its claim against debtor, whom it alleged to be acting as the agent of the Pension Plan in committing the alleged wrong. Because the release of an agent releases of the principal, collateral estoppel would bar Resorts' claim against the Pension Plan as well. Respondent does not dispute the merits of the *Otero Mills* test in determining when non-debtor injunctions may be appropriate. Nor does respondent dispute the fact that Petitioner would satisfy this test.

III. Section 524(g) of the Bankruptcy Code Does Not Affect Bankruptcy Courts' Authority To Release Non-Debtors in Non-Asbestos Cases under Section 524(e).

Respondent's Brief in Opposition further highlights how the Ninth Circuit has misconstrued subsection 524(g) (recently added by the Bankruptcy Reform Act of 1994) in attempting to bolster its interpretation of subsection 524(e) of the Bankruptcy Code. Because subsection 524(g) specifically provided for non-debtor releases in only a limited class of asbestos cases, the Ninth Circuit inferred that subsection 524(e) must therefore deny authority in other kinds of cases. See Petitioner's Appendix at 20a, n.6, and Respondent's Brief at 16. However, such an interpretation is directly contradicted by the congressional committee report accompanying the amendment, which expressly states that section 524(g) was "*not intended to alter any existing authority bankruptcy courts may already have to issue injunctions in connection with a plan of reorganization.*" 140 Cong. Rec. H 10,765 (October 4, 1994) (emphasis added). See Petition at 14-15. Thus, the legislative history of section 524(g) clearly establishes that Congress did not view section 524(e) as a blanket prohibition against non-debtor releases.

IV. There Has Been No "Unappealable Ruling" that the Nevada Bankruptcy Court Lacked Subject Matter Jurisdiction To Grant the Non-Debtor Release.

Respondent's assertion that there has been a "final and unappealable ruling" that the Nevada Bankruptcy Court lacked subject matter jurisdiction to release the Pension Plan (Brief in Opposition at 18-19) is blatantly incorrect. Neither the Ninth Circuit nor the District Court ever stated that the Nevada Bankruptcy Court lacked subject matter jurisdiction to release the Pension Plan in this case.

Rather, the Ninth Circuit merely stated that "Lowenschuss has waived consideration of the issue of whether the bankruptcy court improperly retained jurisdiction over *future litigation* of Resorts' claim against the Pension Plan..." Petitioner's Appen-

dix at 20a (emphasis added). This question of the Bankruptcy Court's retention of jurisdiction over *future* litigation is not relevant to the issues Petitioner has raised and has nothing to do with whether this Court should grant certiorari in this case. In contrast, the specific issue of whether the bankruptcy court had power to release or enjoin actions against the Pension Plan was obviously preserved for appeal — or else it would not have been addressed by the Ninth Circuit.

CONCLUSION

The issue of whether bankruptcy courts have the equitable power to release or enjoin claims against non-debtors is undeniably one of first impression before this Court. It is a question of national importance that is ripe for review and on which the circuits are deeply divided. Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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